Supreme Court, U.S.
FILED

No. 96-355 AUG 30 1996

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, *Petitioner*,

v.

MICHAEL ANGELO MORALES, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN,
Attorney General
GEORGE WILLIAMSON,
Chief Assistant Attorney General
LINDA C. JOHNSON, Acting
Senior Assistant Attorney General
SUSAN LEE FRIERSON,
Deputy Attorney General
DONALD E. DENICOLA,
Supervising Deputy Attorney General
*KEITH H. BORJON,
Supervising Deputy Attorney General
*Counsel of Record
300 South Spring St.
Los Angeles, CA 90013
Telephone: (213) 897-2362
Counsel for Petitioner

68 pp

QUESTIONS PRESENTED
(CAPITAL CASE)

Do federalism concerns apply in a habeas corpus action brought under 28 U.S.C. section 2254 so that a federal court must honor a State's sovereign authority to create and apply its own neutral discretionary rules of procedure, rendering a federal claim forfeited, as long as the State's invocation of the rule does not evade or is not pre-empted by federal law?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No.

ARTHUR CALDERON, *Petitioner*,

v.

MICHAEL ANGELO MORALES, *Respondent*.

Arthur Calderon, Warden of California State Prison at San Quentin, ("the warden") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996), reversing the district court's dismissal of 37 claims presented in a petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254. A copy of that decision is attached as Appendix A to this petition for writ of certiorari. The order of the United States District Court for the Centr. District of California that dismissed the 37 habeas claims is unreported and is reproduced and attached as Appendix B.

STATEMENT OF JURISDICTION

The warden timely invokes the Court's jurisdiction pursuant to 28 U.S.C. section 1254(1). The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 4, 1996.

CONSTITUTIONS, STATUTES OR REGULATIONS

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 2254 of title 28, United States Code, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On April 7, 1983, a jury in the Superior Court of California for the County of Ventura convicted respondent Morales ("Morales") of the first degree murder of Terri W., conspiracy to commit the murder of Terri W., and the rape of Terri W. Cal. Pen. Code §§ 182, 187, 261. The jury further found true two death-eligible special circumstances, (1) that Morales intentionally tortured Terri W., and (2) that Morales had committed the murder by means of lying-in-wait. Cal. Pen. Code § 190.2.

On April 25, 1983, that same jury found that the aggravating factors outweighed the mitigating factors and returned a death verdict. On June 14, 1983, the Superior Court denied Morales's motion to reduce the verdict from death to life without parole. On April 6, 1989, the California Supreme Court affirmed the judgment of conviction and sentence in its entirety except that it reversed a trial court ruling of a judgment n.o.v. On June 1, 1989, the California Supreme Court denied rehearing and modified language in the opinion. People v. Morales, 770 P.2d 244 (1989).

On June 6, 1989, the California Supreme Court adopted policies that governed the litigation of capital cases before that court. The policies were adopted for the express purposes of

> "(i) ensuring that potentially meritorious habeas corpus petitions will be presented to and heard by this court in a timely fashion; (ii) providing appointed counsel some certainty of payment for authorized legal work and investigation expenses; and (iii) providing this court with a means to monitor and regulate expenditure of public funds paid to counsel who seek to

investigate and file habeas corpus petitions." Policy 3.

The policies were expressly effective June 6, 1989 to all habeas corpus petitions, "whether the appeals therefrom are pending or previously resolved." Policy 3. The policies explained that the California Supreme Court's appointment of counsel for a person under a sentence of death is for representation in the direct appeal, the preparation and filing of habeas corpus petitions, the preparation and filing of a petition for writ of certiorari in the United States Supreme Court, proceedings related to the setting of an execution date, and clemency proceedings before the Governor of California. Policy 3 Standard 2-1. The policies did not allow the withdrawal of counsel of record absent the presence of substitute counsel. Policy 2.

The policies adopted timeliness standards by imposing on appellate counsel in capital cases "a duty to investigate factual and legal grounds for the filing of a petition for writ of habeas corpus." Policy 3, Standard 1-1. The policies explicitly incorporated existing California law, as set out in *In re Stankewitz*, 708 P.2d 1260, 1262 n.1 (1985), requiring the presentation of habeas corpus claims without substantial unjustified delay. Policy 3, Standard 1-1.3. The policies also required appellate counsel to file in the California Supreme Court "on or before the date the appellant's opening brief on appeal is filed, or within 120 days after the date on which these standards are announced, whichever is later" a "Confidential request for expenses to investigate potential habeas corpus issues." Policy 3, Standard 2-3. The policies also allowed without prior court approval the expenditure of $3,000 for reasonable expenses and legal fees associated with the request for investigative expenses. Policy 3, Standard 2-6.

On November 27, 1989, the Court denied certiorari in Morales' appeal. Morales v. California, 493 U.S. 984 (1989).

On July 20, 1992, Morales filed a petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254 in the United States District Court, Central District, raising 53 claims. On September 28, 1992, the Warden filed a motion to dismiss the petition for writ of habeas corpus. On November 16, 1992, the district court granted in part the Warden's motion to dismiss, dismissing 33 of the claims in the petition, and ordering an answer to the remaining 20 claims in the petition. On December 27, 1992, the Warden filed an answer to the 20 claims and a memorandum of points and authorities in support thereof.

On December 16, 1992, Morales filed a petition for writ of habeas corpus in the California Supreme Court. In April, 1993, Morales filed a "supplemental" petition for writ of habeas corpus. On July 28, 1993, the California Supreme Court denied Morales's two habeas corpus petitions in separate identical orders that read:

> Petition for writ of habeas corpus DENIED on the merits and as untimely. (See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Stds. 1-1.1 to 1-3; In re Stankewitz (1985) 40 Cal.3d 391, 396, fn.1.)
>
> Mosk, J. is of the opinion that an order to show cause should issue.

On January 14, 1994, Morales filed a first amended petition for writ of habeas corpus in federal court. This amended petition raised 37 claims that were raised in the California Supreme Court in the December 1992 and April 1993 habeas petitions. The amended petition also contained 2 claims, that had never been

presented by Morales to any state or federal court[1]. The amended petition also realleged the 20 claims from Morales's first petition for writ of habeas corpus that had already been answered by the Warden and traversed by Morales.

On March 14, 1994, the Warden filed a motion to dismiss the entire first amended petition for writ of habeas corpus. The district court granted the motion. The court found 37 claims procedurally barred. In particular, the court found claims Number 1 through 15, 17, 19, 24, 26 through 30, 33 through 42, 50, 55, 58, and 59 procedurally barred. The Court found that these particular claims were raised in the California Supreme Court in the habeas corpus petitions filed in that court in December 1992 and in April 1993. The court also found that the two California Supreme Court orders in each of those two cases clearly and explicitly denied all of petitioner's 37 state habeas corpus claims "as untimely" under California law.

The district court found that the delay rule invoked in this case was a longstanding California rule governing habeas corpus petitions and that California case law identified limited circumstances where substantial delay could be justified. The court found that where a habeas corpus petitioner is acting as his own counsel and is both uneducated and lacking knowledge of the law, California case law had accepted such circumstances as exceptional. The court found that Morales "has been represented by counsel in the California Supreme Court continuously throughout his appeal to date, and for that reason, appears to fall outside the exception identified under California law."

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1. These claims are not before this Court because they have been withdrawn. Morales v. Calderon, 85 F.3d 1387, 1389 n.4 & n.5 (9th Cir. 1996).

The district court also found that the two procedural bars invoked by the California Supreme Court were adequate to support its judgment in the two state habeas corpus actions. Relying in part on the Court's decision in Howlett v. Rose, 496 U.S. 356 (1990), the court found that the rules invoked by the California Supreme Court in this case were neutral discretionary rules of judicial administration that formed a "valid excuse" for the state court's timeliness bar. The court found no evidence that the California Supreme Court had evaded its obligation to enforce the Constitution or had discriminated against the presentation of federal questions.

The court also found that Morales' showing that the California Supreme Court had not invoked procedural bars against other state habeas corpus petitioners in some other cases did "not reveal any improper 'discrimination' under the Supremacy Clause against federal constitutional claims." The court also found that "to the extent that California law and the practice of the California Supreme Court may allow unjustifiably delayed federal constitutional claims to be heard on the merits, the law and the practice reflect state judicial receptiveness to, not hostility toward, the presentation of federal constitutional claims." Relying on Prihoda v. McCautry, 910 F.2d 1379, 1384, (7th Cir. 1990), the court found that California's delay rule was firmly established and that to disregard the invocation of the rule because the state court "sometimes allows otherwise untimely federal constitutional claims to be heard on the merits," would "induce the California Supreme Court to make its habeas corpus procedural rules 'draconian rather than to allow prisoners the latitude now available.'"

The district court also dismissed as procedurally defaulted two claims that had never been presented to

the California Supreme Court, finding, based on the California Supreme Court's two procedural bar orders already before the district court, a reasonable basis to conclude that these claims were likewise defaulted. The Court found that Morales had made an inadequate showing of cause and prejudice and a miscarriage of justice, but allowed Morales to make a more particularized showing of cause and prejudice or miscarriage of justice.[2/]

The United States Court of Appeals reversed. The court found that the adequate state ground doctrine did not require "a showing of deliberate manipulation to avoid federal review." Morales v. Calderon, 85 F.3d 1387, 1391 (9th Cir. 1996). The court stated "that the issue here is not whether the State is allowed to invoke its rule irregularly for its own purposes," but rather, relying on the Court's non-habeas decisions in Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982) and Barr v. City of Columbia, 378 U.S. 146, 149 (1964), the issue was whether the state rules were "strictly or regularly followed." The court found that this "Court has added

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2. On August 18, 1994, Morales moved the district court to reconsider its earlier ruling based on the theory that there had been a change in law. In particular, Morales urged that the decision in Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), cert. denied _ U.S. __, 130 L. Ed. 2d 1127 (1995) required the court to find the procedural bars invoked inadequate. The district court denied the motion. The court found Siripongs distinguishable. In particular, the court found that the order challenged in Siripongs, unlike the order in this case, failed to actually identify any particular procedural rule as a basis of any default. The district court also found Siripongs was distinguishable on the basis that the case involved a second or piecemeal petition, governed by particular state procedural rules, whereas this case involves a delayed first petition, governed by the state's timeliness rule.

no requirement of a showing of manipulative intent on the part of the state court." Id. at 1392.

The Ninth Circuit Court of Appeals also held that the California Supreme Court had not firmly established or strictly or regularly applied its timeliness rules. Id. at 1392-93. However, the court did not make any actual findings that the California Supreme Court had failed in other cases to strictly and regularly apply its state habeas rules. The court conceded that it did not know how to interpret a series of summary denial orders in other California Supreme Court capital habeas cases presented by Morales that "may indeed represent consistent exercises of discretion," id. at 1392, and instead predicated its conclusion that the timeliness rules were neither well-established nor strictly or regularly applied based on the nature of the rules themselves.

The court found it "difficult to articulate California's timeliness requirements as they applied" to Morales' state habeas corpus petitions filed almost ten years after his conviction and more than three-and-one-half years after conclusion of his appeal. Id. at 1390. The court found that California's rule requiring habeas petitions be filed without substantial unjustified delay and the California Supreme Court Policies requiring investigation and presentation of habeas claims without substantial delay or good cause "did not provide petitioner with adequate notice of when his claims would be barred." Id. at 1393. The court premised its findings of lack of firmly established and strictly or regularly applied timeliness rules on its view that neither the California Supreme Court Policies governing capital habeas petitions nor the longstanding substantial delay rule "established what amount of delay the court would consider 'substantial,' nor did either set out criteria for determining 'good cause' to excuse such delay." Id. at 1391.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case involves Morales' default of 37 constitutional claims that were first brought on state collateral attack almost ten years after his judgment of conviction and more than three-and-one-half years after the California Supreme Court decided his direct appeal. These facts present the Court with a substantial question of national importance by requiring the Court to define for the very first time in a federal habeas setting the amount of deference a federal court should give a State's invocation of a procedural bar in recognition of the State's sovereign power to create and invoke its own neutral rules of procedure. The Court has never before been called upon to decide whether the principles of comity and federalism affect either the nature or the application of the adequate state ground test in an action filed under 28 U.S.C. section 2254.

The Court's case law in non-habeas corpus cases sets forth tests for the adequacy of a state ground that vary in the degree of deference that is paid to a State court's invocation of procedural bars. One formulation of the test in non-habeas cases is quite deferential and honors state procedural bars as long as the bar has not been invoked to evade federal law or is not preempted by federal law. Another formulation in non-habeas cases is less deferential and demands of State courts that they firmly establish and regularly and consistently apply state procedural bars before federal courts are required to honor their invocation. This less-deferential test was born in a number of the Court's civil rights cases where procedural bars were invoked with pointless and meaningless severity and is found in a number of other non-habeas cases.

The Ninth Circuit Court of Appeals has taken this less deferential formulation of the doctrine and

applied it in an unprecedented manner. The court found no pointless, meaningless, or severly novel interpretations of California law. Indeed, the court did not make any actual findings that the California Supreme Court had failed in other habeas cases to apply strictly and regularly its timeliness rules. Instead, conceded that it could not know from Morales' showing that there had been irregular or inconsistent application, and predicated its inadequacy finding on its judgment that the elements of the timeliness rules did not give Morales adequate notice of when his claims would be barred.

Certiorari should be granted because adoption of the evasion or pre-emption formulation of the adequate state ground doctrine is necessary (1) to afford sufficient deference to California's sovereign right under the Tenth Amendment of the Constitution to create and invoke timeliness rules that apply to state collateral attacks on death penalty judgments, (2) to afford sufficient deference to the federalism and comity concerns unique to habeas corpus cases under 28 U.S.C. section 2254, and (3) to make the Ninth Circuit Court of Appeals decision consistent with the Court's prior cases regarding "firmly established" and "strict" and "regular" enforcement of state rules. This case presents an important question of federal law, unresolved by this Court, with especially far-reaching impact in collateral attacks on state death penalty judgments.

ARGUMENT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW OF NATIONAL SIGNIFICANCE BECAUSE THE COURT HAS NEVER BEFORE DEFINED THE AMOUNT OF DEFERENCE DUE A STATE COURT'S INVOCATION OF A PROCEDURAL BAR UNDER THE ADEQUATE STATE GROUND DOCTRINE IN FEDERAL HABEAS CORPUS PROCEEDINGS BROUGHT BY A STATE PRISONER

> "The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the power granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."

United States v. Lopez, __ U.S. __, 131 L. Ed. 2d 626, 642 (1995) quoting McCulloch v. Maryland, 4 Wheat 316 (1819).

The case at bar involves the California Supreme Court's invocation of two timeliness bars to the presentation of constitutional claims brought by Morales on state collateral attack almost ten years after his conviction and more than three-and-one-half years after the termination of Morales' direct appeal. These facts present the Court with a question "perpetually arising" in federal courts in habeas corpus cases brought under 28 U.S.C. section 2254.

The adequate and independent state ground doctrine is a rule that defines the constitutional balance

between federal and state sovereignty and "accords respect to state courts as decisionmakers by honoring their modes of procedure." Howlett v. Rose, 496 U.S. 356, 370 n.16 (1990). The doctrine has been in existence for well over 100 years. Murdock v. City of Memphis, 87 U.S. 590 (1875). However, lower federal courts lack guidance in this area of law because the Court's application of the doctrine to federal habeas corpus proceedings brought by prisoners in State custody has been, by the Court's own admission, "somewhat tortuous." Wainwright v. Sykes, 433 U.S. 72, 82 (1977).

The warden respectfully calls upon the Court to articulate for the first time the precepts that define the "distinction between what is truly national and what is truly local," United States v. Lopez, __ U.S. __, 131 L. Ed. 2d at 643, for lower federal courts attempting to decide on federal habeas whether a state procedural bar is adequate. This question of first impression provides the Court the opportunity to advise lower federal courts whether the nature and application of the doctrine in federal habeas proceedings under 28 U.S.C. section 2254 is any different from the nature and application of that doctrine in non-habeas proceedings.

A. The Adequate State Ground Doctrine In Habeas Corpus Proceedings Under 28 U.S.C Section 2254

A brief review of the history of the adequate state ground doctrine in the habeas context reveals that the Court has never been called upon to define the national versus local constitutional distinction in a section 2254 case. As recognized by the Court in Wainwright, the earliest "pertinent decisions" on the subject are Ex parte Spencer, 288 U.S. 652 (1913) and Brown v. Allen, 344 U.S. 443 (1953).

In Spencer, the Court dismissed as untimely a petition for writ of habeas corpus filed by a prisoner in state custody. In particular, the habeas petitioner alleged that his sentence constituted an ex post facto punishment under the Constitution. The Court refused to hear the state prisoner's claim by employing the "often expressed" rule "that the writ of habeas corpus is not to be used as a writ of error." The Court held that petitioner's failure to avail himself of multiple opportunities to raise his claim in the state courts barred consideration of the claim on habeas corpus. Ex parte Spencer, 288 U.S. at 659-60; id. at 663.

In Brown v. Allen, the Court, relying in part on Spencer, refused to hear an array of constitutional issues because the state appeal of one petitioner in that case had been dismissed when the statement of appeal was filed one day late. Finding the state rule virtually identical to its own rule for perfecting appeals, the Court found the rule to be an independent and adequate state ground. 344 U.S. at 485-87.

This changed, of course, in Fay v. Noia, 372 U.S. 391 (1963), where the Court overruled Brown, and held that the adequate and independent state ground doctrine did not extend "'to limit the power granted the federal courts under the federal habeas statute.'" Wainwright v. Sykes, 433 U.S. at 82-83 quoting Fay v. Noia, 372 U.S. at 399. In Fay, another instance involving a failure to file an appeal, the Court created a discretionary standard that denied federal review only to those "who had deliberately by-passed the orderly procedure of the state courts" and had effected an actual knowing waiver, "an intentional relinquishment or abandonment of a known right or privilege," of federal claims. Fay, 372 U.S. at 438, 439. In so doing, the Court held that "the exigencies of federalism" encompassed in "the State's valid interest in orderly

procedure" were sufficiently vindicated by the forfeiture of state, but only state, remedies. Id. at 433.

Thirteen years later, the Court effectively limited Fay to its facts in Francis v. Henderson, 425 U.S. 536 (1976), holding that "considerations of comity and federalism" required federal courts to honor a state procedural rule requiring pretrial objections to grand jury impanelments to the same degree federal courts honored a similar federal procedural rule, by barring the defaulted claim in the absence of a showing of "cause" and "prejudice." In so doing, the Court acknowledged Louisiana's longstanding requirement of bringing challenges to the grand jury composition prior to trial, 425 U.S. at 540-41, but undertook no inquiry whether the state court had itself "strictly or regularly followed" this rule of procedure. Cf. Barr v. City of Columbia, 378 U.S. 146, 149 (1964). Indeed, in order to reach the issue in Francis, the Court assumed the adequacy of the state bar. See Francis, 425 U.S. at 543 (Brennan J., dissenting) ("'even when state procedural grounds are adequate . . ., federal habeas corpus relief is nonetheless available.'") (emphasis omitted).

The following year, the Court further confined the effects of Fay. Wainwright v. Sykes, 433 U.S. 72, explicitly rejected "the sweeping language of *Fay v. Noia*" as applied to a state contemporaneous objection requirement "both for the fact that it is employed by a coordinate jurisdiction within the federal system and the many interests which it serves in its own right." 433 U.S. at 87-88. Thus, the Court did not apply the "deliberate bypass" and "knowing waiver" test and instead found that "[t]he 'cause'-and-'prejudice' exception of the *Francis* rule will afford an adequate guarantee [of constitutional rights under section 2254]." 433 U.S. at 90-91. Once again, the Court did not consider whether the state court had

"strictly or regularly" applied its contemporaneous objection rule[3].

Finally, in 1991, the Court expressly overruled Fay in Coleman v. Thompson, 501 U.S. 722 (1991), when it honored the dismissal of a state habeas appeal based on the untimely filing of the notice of appeal. Again, the Court assumed the adequacy of the state procedural default without inquiry into the regularity and consistency of the State's invocation of the bar. 501 U.S. at 750. In fact, the Court expressly declined to consider the adequacy of the state ground. Id. at 744.

The foregoing reveals that the Court has never held, on federal habeas review under section 2254, that a state procedural bar is inadequate because it is not firmly established and regularly applied.[4] The Court has never been called upon to decide in the habeas

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3. This Court rejected the habeas petitioner's argument that the state "did not actually have a contemporaneous-objection rule" based on the "unmistakable terms" of the rule, the state appellate courts' refusal to hear the claim, and a line of state authorities interpreting the rule as a contemporaneous objection requirement. Wainwright, 433 U.S. at 85-86.

4. Once, in Dugger v. Adams, 489 U.S. 401 (1989), the Court *rejected* in a footnote a habeas petitioner's claim that the State court had failed to apply its procedural rule consistently and regularly. The Court found that the challenged rule had been applied "[i]n the vast majority of cases" and the noted state cases to the contrary were not "sufficient to undercut the adequacy" of the state procedural rule. Dugger, 489 U.S. at 410-12 n.6. In a non-habeas case, however, the Court has held that an assumed erroneous application of state law in declining to rule on a federal claim does not establish the lack of strict or regular enforcement of the rule where the claimant fails to substantiate any claim that the state courts in general applied the law in an irregular, arbitrary, or inconsistent manner. Jimmy Swaggart Ministries v. California Board of Equalization, 493 U.S. 378, 397-98 (1990).

context what is sufficient to undercut the adequacy of a state procedural bar.

The case at bar provides the Court with the opportunity to decide whether the adequate state ground doctrine, which itself is a principle premised on federalism teachings, see United States v. Lopez, __ U.S. __, 131 L. Ed. 2d at 650 (Kennedy J., concurring), should be applied, because of federalism precepts unique to section 2254 cases, in a different manner from how the Court has applied the rule in non-habeas corpus settings. Indeed, now that the Court has fully abandoned the Fay model of federalism wherein "the State's valid interest in orderly procedure" was once considered sufficiently vindicated by the forfeiture of State, but not federal, remedies, Fay v. Noia, 372 U.S. at 433, this case calls upon the Court to articulate a model of federalism under the Supremacy Clause and the Tenth Amendment of the Constitution that honors a State's invocation of a procedural bar so long as the invocation of the state rule does not evade or is not pre-empted by federal law.

B. The Adequate State Ground Doctrine In Non-Habeas Corpus Cases

The Court's articulation of federalism principles in the adequate state ground doctrine in non-habeas proceedings vary in the degree of deference given to a state court's determination of state law questions that preclude review of federal questions. On one hand, the Court has articulated the highly deferential view of state courts wherein "it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe [state] . . . laws correctly." Murdock v. City of Memphis, 87 U.S. at 626. This view, which was adopted by the district court in this case, honors state court decisions

predicated on state law that preclude adjudication of federal questions so long as the invocation of state rules was not "set up as an evasion" of federal law, Rogers v. Alabama, 192 U.S. 226, 231 (1904), or does not reflect an "intent to avoid the Federal questions," Vandalia Railroad v. South Bend, 207 U.S. 359, 367 (1907), or "unless those [state] rules are pre-empted by federal law. Howlett v. Rose, 496 U.S. at 372.

At other times, the Court in non-habeas cases has articulated standards governing the adequate state ground doctrine which do not focus on evasion or pre-emption, but rather assume plenary review of the federal question simply because the State's invocation of a procedural rule appears to be discretionary, Sullivan v. Little Hunting Park, 396 U.S. 229, 234 (1969); Williams v. Georgia, 349 U.S. 375, 383 (1955), or has not been "strictly or regularly followed," Barr v. City of Columbia, 378 U.S. at 149, or may have been invoked for the first time, Johnson v. Mississippi, 486 U.S. 578, 588 (1988). The United States Court of Appeals for the Ninth Circuit invoked this view in finding California's timeliness rules in habeas corpus cases were inadequate because the California Supreme Court had failed to apply those rules in a well-settled, regular and consistent manner.

This case therefore presents the Court with the opportunity to advise lower federal courts that a State's invocation of a procedural bar is entitled to deference so long as the bar has not been invoked to evade the presentation of a federal question or the bar has not been pre-empted by federal law.

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C. Certiorari Should Be Granted Because Adoption Of The Evasion And Pre-emption Formulation Of The Adequate State Ground Doctrine Is Necessary To Afford Sufficient Deference To California's Sovereign Right To Create And Invoke Procedural Rules Under The Tenth Amendment And The Supremacy Clause Of The Constitution

First, certiorari should be granted because this case presents an important question of national significance involving the States' administration of its criminal laws and procedure. This is an area traditionally where the States are recognized as sovereign under the Tenth Amendment. As the Court recently declared: "it is normally 'within the power of the state to regulate procedures under which its laws are carried out . . . .'" Montana v. Egelhoff, __ U.S. __, 135 L. Ed. 2d 361, 368 (1996) (opinion of Scalia, J.).

Here, the California Supreme Court exercised its power to "regulate procedures under which its laws are carried out" when it invoked two habeas corpus timeliness rules to bar Morales' two state habeas petitions filed almost ten years after his conviction and more than three-and-one-half years after conclusion of Morales' direct appeal. This exercise of State power illustrates "'the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to the limitations imposed by the Supremacy Clause.'" Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

The Ninth Circuit Court of Appeals rejection of these two timeliness bars as inadequate requires the Court to decide whether the Ninth Circuit can ignore these sovereign rules when Morales has provided no reason to suggest that the California Supreme Court invoked the bars to evade federal law or that federal law

pre-empted the bars and simply because the Ninth Circuit holds the subjective and novel view that the nature of the rules themselves fails to give Morales "adequate notice of when his claims would be barred." Morales v. Calderon, 85 F.3d at 1393.

A substantive evaluation of California's timeliness bars as to whether the rules give "fair" or "adequate" notice of when collateral attacks on criminal judgments will be barred runs afoul of the axiom that a federal court cannot "substitute its own view of what should be the better rule, for that of the state court." Demorest v. City Bank Company, 321 U.S. 36, 42 (1944).

D. Certiorari Should Be Granted Because Adoption Of The Evasion And Pre-emption Formulation Of The Adequate State Ground Doctrine Is Necessary To Afford Sufficient Deference To The Comity And Federalism Concerns Unique To Habeas Corpus Cases Under 28 U.S.C. Section 2254

Second, in addition to the fact that this case involves a question within the traditional realm of state sovereignty, certiorari should be granted because this case presents an important question of national importance governing the scope of the writ of habeas corpus brought by prisoners in state custody. The Court has used as a benchmark for measuring the scope of the writ under section 2254 the States' interest in finality of criminal judgments. "'The interest in leaving concluded litigation in a state of repose'" free from "'further judicial revision'" has played a defining role in shaping the scope of the writ. Teague v. Lane, 489 U.S. 288, 306 (1989) (opinion of O'Connor, J.); accord, Butler v. McKeller, 494 U.S. 407, 412 (1990). Indeed, this defining distinction between direct and collateral review of state criminal judgments has become so prominent that it now,

in the Court's view, "resounds throughout our habeas jurisprudence." Brecht v. Abrahamson, 507 U.S. 619, 633 (1993).

Thus, this case requires the Court to decide whether the States' interest in finality of its criminal judgments make it necessary to adopt an evasion or pre-emption formulation of the adequate state ground doctrine in order to protect the States' interest in finality of its criminal judgments. The Court has used finality of state criminal judgments as the basis for often applying "different standards on habeas than would be applied on direct review." Brecht, 507 U.S. at 634; e.g. id. at 633-37 (applying less stringent harmless error standard on collateral review); Teague v. Lane, 489 U.S. at 305-10 (opinion of O'Connor, J.) (new rules of constitutional law do not have retroactive effect on collateral review except in limited circumstances); Pennsylvania v. Finley, 481 U.S. 551, 555-56 (1987) (no constitutional right to counsel on collateral review).

Such finality considerations might require a more deferential standard of adequacy applied on federal habeas review of state procedural bars than would be applied on direct review of those same procedural bars. "Indeed, this interest in finality might well lead to a decision to exclude completely certain legal issues, whether or not properly determined under the law prevailing at the time of trial, from cognizance of courts administering this collateral remedy [under section 2254]." Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan J., concurring in part and dissenting in part).

The warden respectfully submits that the finality concerns that now "resound throughout" the Court's habeas jurisprudence weigh heavily enough for the Court to decide now that a highly deferential adequate state ground test that honors all procedural bars except in cases of evasion or pre-emption combined with "[t]he

'cause'-and-'prejudice' exception of the *Francis* [v. Henderson] rule will afford an adequate guarantee [of constitutional rights under section 2254]." Wainwright v. Sykes, 433 U.S. at 90-91. This is especially true since "the procedural default rule of Wainwright v. Sykes has its historical and theoretical basis in the 'adequate and independent state ground' doctrine." Harris v. Reed, 489 U.S. 255, 260 (1989).

In Francis v. Henderson, 425 U.S. 536, the Court found "'no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants.'" 425 U.S. at 542. The Ninth Circuit's opinion in this case calls upon the Court now to decide whether there is any reason to give greater preclusive effect to the federal delay rule, found in Rule 9 of the Rules Governing Section 2254 Cases In The United States District Courts, than to the two California delay rules invoked in this case by the California Supreme Court.

The Ninth Circuit's finding of inadequacy is based on its subjective view that the substantive elements of California's timeliness bars failed to give Morales "adequate notice of when his claims would be barred." Morales v. Calderon, 85 F.3d at 1393. This is because, in the Court's view, "[n]either the Standards [found in the California Supreme Court Policies] nor Stankewitz['s substantial delay rule] . . . established what amount of delay the court would consider 'substantial' . . . ." Id. at 1391.

Rule 9's prohibition of delayed petitions likewise fails to give Morales any "notice of when his claims would be barred" and fails to establish "what amount of delay" is prohibited in federal court. However, a federal court is nonetheless bound to apply the rule and cannot read into the rule its own ad hoc "equitable" concerns of "fair" or "adequate" notice not found in the rule itself.

Lonchar v. Thomas, 517 U.S. ___, 134 L. Ed. 2d 440 (1996). Thus, this case calls upon the Court to decide whether a federal court may disregard a state's delay rules based on its own "equitable" concerns of "fair" or "adequate" notice not found in the state rules themselves where it would be prohibited from ignoring the federal delay rule based on its own "equitable" concerns of "fair" or "adequate" notice not found in the rule itself.

E. Certiorari Should Be Granted Because Only The Evasion And Pre-emption Formulation Of The Adequate State Ground Test Is Consistent With This Court's Prior Cases Regarding "Firmly Established" And "Strict" And "Regular" Enforcement Of State Procedural Rules

Third, in addition to the issues in this case pertaining to State sovereignty over criminal procedure and State interests in finality of criminal judgments, certiorari should be granted because the Court must explain, based on the procedural bars invoked here, that the "firmly established" and "strictly" or "regularly" followed formulations of the adequate state ground doctrine are themselves grounded in evasion principles. The Constitution simply does not "assure uniformity of judicial decisions . . . [or] immunity from judicial error," Beck v. Washington, 369 U.S. 541, 554-55 (1961), and the Court has honored the States' invocation of procedural rules so long as the rules have not been invoked with "pointless severity," NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 297 (1964), or as "an arid ritual of meaningless form," Wright v. Georgia, 373 U.S. 284, 291 (1963), or in a "novel" fashion designed to "thwart review" of federal questions, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958). see Barr v. City of Columbia, 378 U.S. at 149 (lunch counter sit-in

case citing Flowers, Wright, and Patterson in support of "strictly or regularly followed" requirement).

Here, the United States Court of Appeals for the Ninth Circuit did not find that the California Supreme Court's invocation of the timeliness bars was "pointless," or "meaningless," or severly "novel." Indeed, the court conceded that it had "no way of knowing" whether a series of "brief minute entries" in other capital habeas cases before the California Supreme Court revealed lack of strict and regular enforcement of the rules, and instead found that the elements of the rules did not give Morales "adequate notice of when his claims would be barred." Morales v. Calderon, 85 F.3d at 1392-93.

Thus, rules which the Court has formulated to deal with "pointless" or "meaningless" and severely "novel" interpretations of state law that evade review have now been applied by the Ninth Circuit to a state law invocation of timeliness bars against a state collateral attack made years after conviction and finality simply because the court views these discretionary rules, which at worst reflect judicial receptiveness, not hostility, to the presentation of federal claims, as not providing Morales "with adequate notice of when his claims would be barred." Morales v. Calderon, 85 F.3d at 1393. Thus, review is necessary so that the Court can hold that its pronouncements in Barr and its progeny were not intended to assure Morales "uniformity of judicial decisions" or "immunity from judicial error" or "adequate notice of when his claims would be barred."

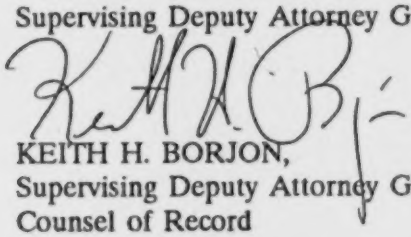
CONCLUSION

Accordingly, for the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in the case at bar.

Dated: August 29, 1996.

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General
GEORGE WILLIAMSON,
Chief Assistant Attorney General
LINDA C. JOHNSON, Acting
Senior Assistant Attorney General
SUSAN LEE FRIERSON,
Deputy Attorney General
DONALD E. DENICOLA,
Supervising Deputy Attorney General



KEITH H. BORJON,
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioner

KHB:gm:js
a:\morales.pwc

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL ANGELO MORALES,
Petitioner-Appellant,

v.

ARTHUR CALDERON, Warden,
Respondent-Appellee.

No. 94-99010
D.C. No.
CV-91-00682-DT
OPINION

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted
September 26, 1995—San Francisco, California

Filed June 4, 1996

Before: Jerome Farris, William C. Canby, Jr.,
and David R. Thompson, Circuit Judges.

Opinion by Judge Canby

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed and remanded a district court judgment. The court held that California's timeliness rule for filing habeas corpus claims, as applied prior to *In re Clark*, 855 P.2d 729 (Cal. 1993), was so unclear and inconsistently applied that it did not afford an adequate independent state ground barring federal review.

In 1983, a California jury convicted appellant Michael Morales of murder and sentenced him to death. The California Supreme Court affirmed on April 6, 1989. On June 6, 1989, the California Supreme Court adopted new standards for habeas corpus petitions arising from judgment of death for appeals pending and previously resolved (Standards).

In November 1989, the United States Supreme Court denied certiorari. Morales filed a habeas petition in federal court presenting 52 claims, including some extra-record claims discovered by his new counsel. The district court dismissed without prejudice the extra-record claims and ordered Morales to present those claims to the California Supreme Court. Morales filed a state habeas petition on December 16, 1992, over three years after his convictions were affirmed. In a brief, "post-card" denial, the California Supreme Court denied the petition for habeas relief on the merits and as untimely.

Morales filed an amended habeas petition in federal court raising the newly-exhausted claims. In April 1994, the federal court granted the state's motion to dismiss on the ground the claims were procedurally defaulted for untimeliness in state court. The court found that the California Supreme Court's procedural bars specifically invoked were adequate and independent state grounds that supported the California Supreme Court's judgment and that Morales had not rebutted the presumption against habeas review of claims defaulted in state court.

Morales appealed, arguing that the state denial of his claims was not based on an adequate and independent ground because the timeliness rule under the Standards was indeterminate and had been applied inconsistently. In support of his position, Morales asserted that the California Supreme Court had denied 35 habeas petitions filed three years after affirmance on direct appeal, and more than half of those denials had not been on grounds of untimeliness. Only 6 cases had

been denied on untimeliness alone. The state countered that uneven enforcement of the timeliness requirement was merely a reflection that discretion is involved in applying the rule and that states may apply their own neutral procedural rules to federal claims.

[1] Although the Standards make it clear that a petition for habeas corpus is presumed timely if filed within 60 (later 90) days, neither the Standards themselves, nor California cases construing those Standards create an unambiguous rule on timeliness beyond the 60 or 90 days. Further, because the California Supreme Court does not provide reasons for its denials of petitions of habeas corpus on timeliness grounds, it is difficult to discern what criteria the court applies when ruling on the timeliness of a petition filed beyond the 60 or 90 days.

[2] The first uncertainty in the Standards is in the requirement that petitions for habeas corpus should be filed "without substantial delay." If the petition is filed after substantial delay, then the petitioner must demonstrate equally uncertain "good cause."

[3] The California Supreme Court first attempted to explain its requirements under the Standards in *Clark*, but that case was not decided until after the California Supreme Court decided Morales's petition. [4] No opinion is expressed as to whether *Clark* succeeded in clearing up the uncertainties of timeliness under the Standards.

[5] There was so much variation in California's timeliness requirement before *Clark* that there was no discernible clear rule for petitions filed more than 90 days after the due date for the reply brief on direct appeal. [6] Invocation of a state rule that is applied only randomly does not preclude a federal court from entertaining a habeas petition on the merits. A state procedural ground is not adequate unless the rule is strictly or regularly followed. There is no requirement of a showing of manipulative intent on the part of the state court.

[7] The exercise of judicial discretion does not render a rule inadequate to support a state decision. But discretion is the exercise of judgment according to standards that, at least over time, can become known and understood within reasonable operating limits.

[8] The cases Morales relied on were decided by brief minute entries, so there is no way to know if the divergent decisions may indeed represent consistent exercises of discretion rather than random applications of the rule.

[9] The California Supreme Court's timeliness rule was not clear, consistently applied, and well-established at any time after Morales's convictions were affirmed and before he filed his first state habeas petition. Therefore, the rule cannot serve as an adequate and independent state ground sufficient to support a procedural default.

COUNSEL

Counsel David A. Senior, Condon & Forsyth, Los Angeles, California, for the petitioner-appellant.

Keith H. Borjon, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

OPINION

CANBY, Circuit Judge:

Michael Angelo Morales, a California death-row inmate, appeals the federal district court's dismissal of the majority of the claims he presented in his first habeas corpus petition in district court. The district court dismissed the claims because the California Supreme Court had denied them not only on the

merits but also as untimely; they were therefore considered to be defaulted. This is an interlocutory appeal of the district court's ruling. We have jurisdiction pursuant to 28 U.S.C. § 1292(b) and F.R.A.P. 5(a). We reverse the district court's dismissal of the claims and remand for consideration of the merits because we find that the state court's denial of the claims was not based on an adequate and independent state ground that bars federal habeas review.

BACKGROUND

In 1983, a California jury convicted Morales of first-degree murder, among other charges, and sentenced him to death. The California Supreme Court affirmed the convictions and sentence by opinion on April 6, 1989, amended June 1, 1989. *People v. Morales*, 770 P.2d 244 (Cal.), *cert. denied*, 493 U.S. 984 (1989). On June 6, 1989, the California Supreme Court adopted new policies regarding death penalty cases, including "Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to such Petitions." *See* Supreme Court Policies Regarding Cases Arising from Judgments of Death, in California Rules of Court – State 745-46 (1990) (hereinafter "Standards").[1] These Standards, effective June 6, 1989, governed "all petitions for writs of habeas corpus arising from judgments of death, whether the appeals therefrom are pending or previously resolved." Standards, Policy 3 at 745.

In November 1989, the United States Supreme Court denied certiorari in Morales's case. Thereafter, Morales obtained new counsel who filed a petition for writ of habeas corpus on July 20, 1992, in federal district court. Morales presented 52 claims.[2] Twenty of these claims were exhausted

[1]In July 1993, the California Supreme Court revised the Standards. *See In re Clark*, 855 P.2d 729, 751 n.18 (Cal. 1993). The amended Standards were published as an appendix to *Clark*. *Id.* at 762-64.

[2]The federal district court, in its April 29, 1994 Order dismissing Morales's first amended petition for writ of habeas corpus, incorrectly stated that Morales presented 53 rather than 52 claims.

in the automatic state appeal and raised issues from the trial record. The other claims involved issues that arose from facts outside the record and were discovered by Morales's new counsel.

The district court dismissed the 32 extra-record claims without prejudice and ordered Morales to present those claims to the California Supreme Court.[3] On December 16, 1992, approximately three and one-half years after his convictions were affirmed, Morales filed his first petition for writ of habeas corpus in the California Supreme Court. The petition raised the 32 extra-record claims and one additional, newly-discovered claim. Morales later filed a supplemental petition, which the court treated as a separate habeas corpus petition, raising three additional claims based on newly discovered facts, and presenting newly discovered facts supporting three of the claims raised in the December 16 petition.

The California Supreme Court denied all relief on both petitions, issuing two orders on July 28, 1993, that both stated:

> Petition for writ of habeas corpus DENIED on the merits and as untimely. (See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Stds. 1-1.1 to 1-3; In re Stankewitz (1985) 40 Cal.3d 391, 396, fn.1.)[.]

The order dismissing the December 16 petition also stated: Mosk, J. is of the opinion that an order to show cause should issue.

Morales then filed his first amended petition for writ of habeas corpus in federal district court, raising the newly-exhausted claims and two more claims attacking the constitu-

[3]The State has since filed in federal district court an answer to the remaining 20 claims that were exhausted in the direct appeal.

tionality of the California death penalty statute.[4] Morales also re-alleged the 20 claims from the first petition, which the State had already answered and Morales had traversed.

In April 1994, the district court granted the State's motion to dismiss. The district court dismissed the newly-exhausted claims on the ground that they were procedurally defaulted for untimeliness in state court.[5] The district court also dismissed the 20 claims already before it from the first petition, noting that these claims were already under consideration.

The district court found that "the California Supreme Court's procedural bars specifically invoked in this case" were adequate and independent state grounds that supported the Supreme Court's judgment. The district court further found that Morales had "failed to make any particularized showing of cause and prejudice or a fundamental miscarriage of justice to overcome the 'presumption against federal habeas review of claims defaulted in state court.' " *See Coleman v. Thompson*, 501 U.S. 722, 747 (1991). The court granted Morales's request to make a more particularized showing of either cause and prejudice or a fundamental miscarriage of justice.

Morales moved for reconsideration in light of *Siripongs v. Calderon*, 35 F.3d 1308 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1175 (1995), decided after the district court had entered its order of dismissal. The district court denied the motion.

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[4]Both of the arguments challenging the constitutionality of the statute have since been rejected by the United States Supreme Court. *See Tuilaepa v. California*, 114 S. Ct. 2630, 2636-39 (1994) (holding that California death penalty special circumstances were not unconstitutionally vague); *Victor v. Nebraska*, 114 S. Ct. 1239, 1251 (1994) (holding that jury instructions defining "reasonable doubt" did not violate Due Process Clause).

[5]The court also dismissed the two claims attacking the death penalty statute, but Morales does not contest this ruling on appeal.

The district court granted Morales's motion to certify the dismissal of these claims for interlocutory appeal, and we granted permission to appeal pursuant to F.R.A.P. 5(a) and 28 U.S.C. § 1292(b). The district court's certification order stayed further briefing of the questions whether, assuming a default, Morales had shown cause and prejudice or a fundamental miscarriage of justice; those issues consequently are not before us.

ISSUE

The issue for our decision is whether the California Supreme Court's timeliness requirement serves as an adequate and independent state ground for its decision dismissing Morales' petition. If it does, Morales has defaulted procedurally on the affected claims and cannot raise them in federal court unless he shows cause and prejudice or a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 750.[6]

ANALYSIS

Morales argues that the state denial of his claims was not based on an adequate and independent ground barring federal review because (1) the California Supreme Court's habeas corpus timeliness Standards are facially indeterminate, (2) the Supreme Court has applied the Standards with a lack of even-handedness, and (3) the Supreme Court's orders of denial are ambiguous and dependent on federal claims. The State, on the other hand, insists that the Standards are adequate neutral rules of judicial administration that, as applied in this case, bar federal review.

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[6]The district court's dismissal of the petition for writ of habeas corpus on the ground of state procedural default involves an issue of law that we review *de novo*. *Hunter v. Aispuro*, 982 F.2d 344, 346 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 240 (1993).

There is usually no doubt that the decision of a state supreme court rests on an adequate and independent state ground when the court's opinion clearly and expressly states that its decision is based on a state procedural rule. *See Coleman*, 501 U.S. at 735-36 (citing *Harris v. Reed*, 489 U.S. 255, 263 (1989)). A state procedural rule does not bar federal review, however, if it is so unclear that it does not "provide[ ] the habeas petitioner with a fair opportunity to seek relief in state court." *Harmon v. Ryan*, 959 F.2d 1457, 1462 (9th Cir. 1992). Nor can a state preclude federal review by invoking procedural rules that the state does not apply consistently. *See Hathorn v. Lovorn*, 457 U.S. 252, 262-63 (1982). We conclude that the California timeliness standard, as applied to Morales, suffers from both of these deficiencies.

I. Uncertainty of California's Timeliness Standards

[1] We find it difficult to articulate California's timeliness requirements as they applied to Morales. The Standards make it clear enough that a petition for habeas corpus is presumed timely if filed within 60 (later 90) days of the final due date of the petitioner's reply brief on direct appeal. Standards § 1-1.2, but Morales's appeal had already been decided at the time the Standards were announced. Neither the Standards themselves nor California cases construing those Standards create an unambiguous rule on timeliness beyond the 60 or 90 days. Further, because the California Supreme Court does not provide reasons for its denials of petitions of habeas corpus on timeliness grounds, it is equally difficult to discern what criteria the state court applies when ruling on the timeliness of a petition filed beyond the 60 or 90 day period.

The Standards, in pertinent part, state:

> 1. Timeliness standards
>
> 1-1. Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds

for the filing of a petition for a writ of habeas corpus. All petitions for writs of habeas corpus should be filed *without substantial delay.*

1-1.1. A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 60 days after the final due date for the filing of appellant's reply brief on the direct appeal.[7]

1-1.2. A petition filed more than 60 days after the final due date for the filing of appellant's reply brief on the direct appeal *may* establish absence of substantial delay if it alleges *with specificity* facts showing the petition was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim.

1-1.3. Alternatively, a petition *may* establish absence of substantial delay if it alleges *with specificity* facts showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 (the date of finality of *In re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn. 1), the petition was filed within a *reasonable time* after that date.

1-2. If a petition is filed after substantial delay, the petitioner must demonstrate *good cause* for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

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[7]Effective September 1990, this period of time was extended to 90 days. *See* California Rules of Court – State (1995) at 982.

1-3. Any petition that fails to comply with these requirements *may* be denied as untimely.

Standards at 745-46 (emphasis added).

[2] The first uncertainty in these Standards inheres in the requirement that petitions for habeas corpus should be filed "without substantial delay." If the petition is filed after substantial delay, then the petitioner must demonstrate similarly uncertain "good cause" for the delay. The source of these requirements is, in part, a footnote in *In re Stankewitz*, 708 P.2d 1260, 1262 n.1 (Cal. 1985) (explaining that petitioner "must point to particular circumstances sufficient to justify substantial delay"). In that case, the petitioner filed his first habeas corpus petition a year and a half after obtaining newly-discovered evidence, while direct review of his murder conviction and death sentence was still pending. *Id.* at 1261, 1262 n.1. The California Supreme Court held that petitioner had made a sufficient showing of justification for delay. *Id.* at 1262 n.1. Neither the Standards nor *Stankewitz*, however, established what amount of delay the court would consider "substantial," nor did either set out criteria for determining "good cause" to excuse such delay. They also did not prescribe whether and when untimeliness might be waived altogether, even though good cause had not been shown.

[3] The vagueness of the Standards could have been cured by narrowing judicial construction in the years immediately following their issuance. We find no such cases, however. The California Supreme Court did attempt to explain at great length its requirements under the Standards in *In re Clark*, 855 P.2d 729 (Cal. 1993), but *Clark* was not decided until a few days after the California Supreme Court denied Morales's petition.

Clark asserted that a petitioner whose conviction was affirmed before announcement of the Standards was nevertheless on notice of the delay rules per *Stankewitz*. *Id.* at 750.

Thus, "any substantial delay in the filing of a petition after the factual and legal bases for the claim are known or should have been known must be explained and justified." *Id.* at 752. *Clark* also stated, however, that "counsel's obligation to investigate possible claims was created only by the [Standards]," and consequently claims discovered after investigation commencing after the date of publication of the Standards (June 6, 1989) and presented promptly thereafter are timely. *Id.*

[4] Despite *Clark*'s emphasis on the duties of counsel that pre-existed the Standards (as well as the *Clark* opinion itself), *Clark* did acknowledge that "no clear guidelines [regarding departure from the habeas corpus rules] have emerged in our past cases." *Id.* at 737. *Clark* was an attempt to clear up such uncertainties. We need express no opinion on whether the attempt succeeded, so that timeliness under the Standards invoked post-*Clark* would constitute an adequate and independent state ground of decision; Morales's petition was denied before *Clark*.

[5] We find so much variation in application of California's timeliness requirements before *Clark* that we conclude that no discernible clear rule then existed for petitions filed more than 90 days after the due date of the reply brief on direct appeal. For example, Morales asserts that at the time his case was litigated in the district court, the California Supreme Court had denied 35 habeas petitions filed three years or more after affirmance on direct appeal, and more than half of those denials had not been on grounds of untimeliness. Only 6 cases had been denied on untimeliness alone. The State does not dispute these figures, but asserts that uneven enforcement of the timeliness requirement is simply a reflection of the fact that some discretion is involved in applying the rule. According to the State, the kinds of variation demonstrated by Morales do not call the rule into question unless there is a showing of deliberate manipulation to avoid federal review. The State relies upon *Howlett v. Rose*, 496 U.S. 356 (1990), which stated that

"States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." *Id.* at 372.

We cannot accept the State's contention as it is put forth, nor do we find *Howlett* apposite. *Howlett* involved the question whether a state defense of sovereign immunity to a federal-law claim could be available in state court when it would not be so in federal court. The concern was that the state was discriminating against a federal cause of action, and the Court's neutrality ruling was simply a response to that concern. The actual holding in *Howlett* was that the state immunity rule was substantive and preempted by federal law. *Id.* at 375-81.

[6] Neutrality is not enough when a rule is applied or not applied wholly at random. We must emphasize that the issue here is not whether the State is allowed to invoke its rule irregularly for its own purposes. The question is whether invocation of a state rule that is applied only randomly may preclude a federal court from entertaining a petitioner's federal claim on the merits. We conclude that the answer to that question is "no." The Supreme Court has stated that "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' " *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)). The Court has added no requirement of a showing of manipulative intent on the part of the state court.

[7] It is true, as the State argues, that procedural rules need not be utterly mechanical. That the application of a rule requires the exercise of judicial discretion does not render the rule inadequate to support a state decision. In fact, a bright-line rule for delay can operate more harshly than a discretionary rule. *See, e.g., Coleman*, 501 U.S. at 727-29 (affirming dismissal of claims barred in state court because petition filed three days late). But judicial discretion is the exercise of judg-

ment according to standards that, at least over time, can become known and understood within reasonable operating limits. To bar federal review, a state procedural rule must be "consistently applied." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994).

[8] It is theoretically possible, we suppose, to reconcile and explain all of the California Supreme Court decisions entertaining on the merits or rejecting as untimely petitions that are three or more years old. Those divergent decisions may indeed represent consistent exercises of discretion rather than random applications of or exceptions to the timeliness rule. But we have no way of knowing whether that is the case. The California Supreme Court's denials of habeas petitions that Morales relies upon were accomplished by brief minute entries in what has been described as "post-card denial." We can discern no apparent relationship between the time of delay and the findings concerning timeliness. Nor could Morales be expected to do so.

We faced a similar problem in *Siripongs v. Calderon*, 35 F.3d 1308, 1318 (9th Cir. 1994), where we held that the district court's dismissal of petitioner's claims in a successive habeas petition on procedural grounds was error. We ruled that a state procedural rule that is discretionary and not applied consistently "cannot act as a bar to federal review. . . . [T]he federal courts should not insist upon a petitioner, as a procedural prerequisite to obtaining federal relief, complying with a rule the state itself does not consistently enforce." *Id.*

In *Siripongs*, the California Supreme Court had not identified a particular procedural rule that it relied on for default, as it did in Morales's case.[6] We noted this deficiency, holding that a procedural default based on an ambiguous order that

[6]The order at issue in *Siripongs* stated:

> Petition for writ of habeas corpus DENIED both for reasons of procedural default and on the merits. Petitioner's motion for "post trial discovery" is denied. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261).

Siripongs, 35 F.2d at 1316.

does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review. *Id.* at 1317-18. We also relied, however, on the fact that, at the time the habeas petition was denied by the state court, the state procedural rules regarding filing of successive petitions were not consistently enforced. *Id.* at 1318. Indeed, we recognized that "the strict standards announced in [*Clark*] did not guide the California courts in 1991, when Siripongs' state petition was denied." *Id.* We conclude that the latter rationale of *Siripongs* is fully applicable here. Here, as in *Siripongs*, we find that the state court's procedural rule was not consistently enforced at the time Morales's petitions were denied. Although the State and the district court distinguish *Siripongs* because it involved a successive petition for habeas review, that fact casts no doubt upon Siripongs' general principle of consistent enforcement of a procedural bar. Nor is *Siripongs* our first endorsement of that principle: "In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells*, 28 F.3d at 1010.

We note that two district courts in this circuit have reached the same conclusion we do with regard to the particular rule at issue in this case. In *Karis v. Vasquez*, 828 F. Supp. 1449, 1463 (E.D. Cal. 1993), the petitioner had filed a successive habeas petition in the California Supreme Court and had failed to explain or justify his delay. The state court summarily dismissed his claims. The district court held that "California's rule concerning delay as a bar to habeas is standardless both substantively and as to duration," did not provide petitioner with adequate notice of when his claims would be barred, and consequently did not bar federal relief. *Id.* at 1464; *cf. Odle v. Calderon*, 884 F. Supp. 1404, 1413-14 (N.D. Cal. 1995). The *Karis* court explained that discretion *per se* does not invalidate a state rule as an independent and adequate state ground, if the discretion is exercised according to clear and articulated standards. *See Karis*, 828 F. Supp. at

1463-64. On the other hand, if it is exercised in an " 'ad hoc rather than a principled basis,' " it does not bar federal review. *Id.* at 1463. (citation omitted).

[9] We conclude that California's rule on timeliness was not "clear, consistently applied, and well-established" at any time after Morales's convictions were affirmed and before he filed his first state habeas petition. *See Wells*, 28 F.3d at 1010. It consequently cannot serve as an adequate and independent state ground sufficient to support a procedural default. *See id.*

II. Independence of the State Procedural Ground

Morales argues in the alternative that, even if all the claims were properly denied on procedural grounds, these grounds were not clearly independent of the rulings on the merits. Federal habeas review is not barred if the state decision " 'fairly appears to rest primarily on federal law, or to be interwoven with the federal law.' " *Coleman*, 501 U.S. at 735 (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)). Morales argues that the California Supreme Court's procedural rulings were interwoven with the federal claims because (1) the orders state that the claims are denied also on the merits and (2) the state court's conclusions about timeliness entailed a consideration of the merits. Because we conclude that the timeliness Standards themselves as applied to Morales are not an adequate and independent ground barring federal review, we need not address these arguments.

CONCLUSION

We reverse the district court's dismissal of Morales's federal habeas corpus claims, which were denied by the California Supreme Court as untimely. We hold that the California Supreme Court's timeliness rule, as applied to Morales and before its further elucidation in *Clark*, did not afford an adequate and independent state ground barring federal review of Morales's claims. We express no opinion as to whether the

California Supreme Court has sufficiently narrowed the timeliness standards or applied them consistently since *Clark*.

We remand this matter to the district court for consideration of Morales's claims on the merits.

ORDER REVERSED; CASE REMANDED.

APPENDIX B

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
DONALD E. DENICOLA
Supervising Deputy Attorney General
KEITH H. BORJON
Deputy Attorney General
State Bar No. 117503
Office of the Attorney General
300 South Spring St.
Los Angeles, CA 90013
Telephone: (213) 897-2362
Attorneys for Respondent

FILED
APR 22 1994
Clerk, U.S. District Court
Central District of California
By Deputy

ENTERED
Clerk, U.S. District Court
APR 29 1994
Central District of California
By Deputy

CAPITAL CASE

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ANGELO MORALES,

Petitioner,

v.

DANIEL VASQUEZ, as Warden of San Quentin State Prison,

Respondent.

CV 91-0682-DT

~~[PROPOSED]~~ ORDER DISMISSING WRIT OF HABEAS CORPUS AND SCHEDULING FIRST AMENDED HABEAS CORPUS AND SUPPLEMENTAL BRIEFING

On April 11, 1994, respondent's motion to dismiss petitioner's first amended petition for writ of habeas corpus came for hearing. After consideration of the written motion and points and authorities, petitioner's opposition, respondent's reply, all exhibits, the oral argument of counsel, and the record in this case, the Court hereby **GRANTS** respondent's motion to dismiss the first amended petition for writ of habeas corpus for the reasons set forth in this order. The Court also requires supplemental briefing as set forth in this order.

On April 7, 1983, a jury in the Superior Court of California for the County of Ventura convicted petitioner of the first degree murder of Terri W., conspiracy to commit the murder of Terri W., and the rape of Terri W. The jury further found true two death-eligible special circumstances, (1) that petitioner intentionally tortured Terri W., and (2) that petitioner had committed the murder by means of lying-in-wait.

On April 25, 1983, that same jury found that the aggravating factors outweighed the mitigating factors and returned a death verdict.

On June 14, 1983, the Superior Court denied petitioner's motion to reduce the verdict from death to life without parole.

On June 1, 1989, the California Supreme Court affirmed the judgment of conviction and sentence in its entirety except that it reversed a trial court ruling of a judgment n.o.v.

On November 27, 1989, the United States Supreme Court denied certiorari.

On July 20, 1992, petitioner filed a petition for writ of habeas corpus in this Court raising 53 claims.

On September 28, 1992, respondent filed a motion to dismiss the petition for writ of habeas corpus.

On November 16, 1992, the Court granted in part respondent's motion to dismiss, dismissing 33 of the claims in the petition, and ordering an answer to the remaining 20 claims in the petition.

On December 27, 1992, respondent filed an answer to the 20 claims and a memorandum of points and authorities in support thereof.

On December 16, 1992, petitioner filed a petition for writ of habeas corpus in the California Supreme Court.

In April, 1993, petitioner filed a "supplemental" petition for writ of habeas corpus.

On July 28, 1993, the California Supreme Court denied petitioner's two habeas corpus petitions in separate identical orders that read:

> "Petition for writ of habeas corpus DENIED on the merits and as untimely. (See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Stds. 1-1.1 to 1-3; In re Stankewitz (1985) 40 Cal.3d 391, 396, fn.1.)
>
> "Mosk, J. is of the opinion that an order to show cause should issue."

On January 14, 1994, petitioner filed a first amended petition for writ of habeas corpus. This amended petition raises 37 claims that were raised in the California Supreme Court in the December 1992 and April 1993 habeas petitions. The amended petition also contains 2 claims, which contain 4 subclaims, that have never been presented by petitioner to any state or federal court. The amended petition also realleges the 20 claims from petitioner's first petition for writ of habeas corpus that have already been answered by respondent and traversed by petitioner.

On March 14, 1994, respondent filed a motion to dismiss the entire first amended petition for writ of habeas corpus. The Court grants the motion as follows:

IT IS ORDERED that Claims Number 1 through 15, 17, 19, 24, 26 through 30, 33 through 42, 50, 55, 58, and 59 are dismissed as procedurally barred. The Court finds that these particular claims were raised in the California Supreme Court in the habeas corpus petitions filed in that court in December

1992 and in April 1993. The Court finds that the two California Supreme Court orders in each of those two cases clearly and explicitly denied all of petitioner's 37 state habeas corpus claims "as untimely."

In denying relief "as untimely," the California Supreme Court cited the California "Supreme Court Policies Regarding Cases Arising from Judgments of Death, Stds. 1-1.1 to 1-3; In re Stankewitz (1985) 40 Cal.3d 391, 396, fn.1." The Supreme Court Policies Regarding Cases Arising from Judgments of Death, Standards 1-1.1 to 1-3, [Policies] refer to the time requirements in capital cases on appeal and on habeas corpus in the California Supreme Court that were adopted in June 1989. The policies imposed an explicit duty to investigate possible habeas corpus claims without delay "regardless whether the appeals therefrom are pending or previously resolved." Policies, std. 1-1.1. The policies also took into account longstanding California case law that any significant delay in seeking collateral relief must be fully justified by particular facts establishing good cause for the delay. In re Stankewitz, 40 Cal.3d 391, 396-97 fn.1, 220 Cal.Rptr. 382 (1985); In re Swain, 34 Cal.2d 300, 304, 209 P.2d 793 (1949). Policies, std. 1-1.3. Stankewitz is the only other authority cited by the California Supreme Court in each of the two orders issued in this case on July 28, 1993. Neither the policies nor Stankewitz involve the application federal constitutional law precepts. They involve only state procedural requirements for the filing of habeas corpus petitions in both capital and non-capital cases.

Preliminarily, petitioner argues that the California Supreme Court's policies respecting capital cases may not be enforced by this Court as "rules" of state procedure because the Policies themselves were created by the California Supreme Court in excess of the California Supreme Court's jurisdiction. The Court rejects this argument. The Court has no authority to define the jurisdiction of the California Supreme Court. Estelle v. McGuire, ___ U.S. ___, ___, 112 S.Ct. 475, 480, 116

L.Ed.2d 385 (1991). Therefore, the Court will not question the authority of the California Supreme Court to create and enforce the Policies. In addition, it appears that the California Supreme Court has already held that California's habeas corpus statute, California Penal Code section 1475, "does not compel courts to consider successive petitions, nor does it purport to restrict the court's inherent power to control its calendar and prevent abuse of the writ." In re Clark, 5 Cal.4th 750, 771, 21 Cal.Rptr. 509 (1993).

The Court finds that the California Supreme Court's orders explicitly denying petitioner's 37 habeas corpus claims "as untimely" are independent of federal law. The Court finds that the two California Supreme Court orders are worded in a manner approved by the United States Supreme Court in Harris v. Reed, 489 U.S. 255, 264 fn.10, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). The California Supreme Court's additional denials of the petitions on "the merits" does not invalidate the independence of the procedural rulings. Ibid.

The Court rejects petitioner's argument that the California Supreme Court's orders invoking untimeliness bars to petitioner's 37 claims are dependent on federal law because California law allows its courts to forgive defaults to review exceptional or compelling constitutional claims. Petitioner argues that the existence of this state law exception makes the application of the procedural bar interwoven with federal law, and therefore dependent upon federal law. The Court rejects this argument for two reasons. First, the Court is not required to examine the orders for the "interweaving" of state and federal law unless "'it fairly appears that the state court rested its decision primarily on federal law.'" Colemen v. Thompson, supra, 501 U.S. at __, 111 S.Ct. at 2557, 115 L.Ed.2d 640. Nothing on the face of the two orders or in the state court record of those two cases give this Court any basis to find that the California Supreme Court decided the cases "the way it did because it believed that federal law required it to do so." Id., at 2556. This Court will not look for the interweaving of

federal and state law "[i]n the absence of a clear indication that . . . [the] state court rested its decision on federal law.l" Coleman v. Thompson, supra, 501 U.S. at ___, 111 S.Ct. at 2557, 115 L.Ed.2d 640.

The Courts also rejects petitioner's argument on its merits. To the extent that California law allows its state courts to forgive habeas corpus procedural defaults and examine the merits of exceptional or compelling federal constitutional claims, the Court finds no basis to conclude that this rule is a creation of federal law or the rule's enforcement is compelled by federal law. The Court finds that the most reasonable explanation that the California Supreme Court found petitioner's state habeas corpus claims untimely is because it believed that state law, not federal law, required it to do so. Coleman v. Thompson, supra, 501 U.S. at ___, 111 S.Ct. at 2556, 115 L.Ed.2d 640.

The Court finds the California Supreme Court's procedural bars specifically invoked in this case are adequate to support its judgment. The Court specifically rejects petitioner's assertion that California's delay rule is completely without parameters. The Court finds that California law explicitly provides for an exception to the delay rule when a habeas corpus petitioner is acting as his own counsel, is uneducated, and is lacking knowledge of the law. See In re Saunders, 2 Cal.3d 1033, 1040, 88 Cal.Rptr. 633 (1970); In re Streeter, 66 Cal.2d 47, 52, 56 Cal.Rptr. 824 (1967); In re Perez, 65 Cal.2d 224, 228, 53 Cal.Rptr. 414 (1966). The court finds that petitioner has been represented by counsel in the California Supreme Court continuously throughout his appeal to date, and for that reason, appears to fall outside this exception identified under California law. The Court has found no published decision of the California Supreme Court that has ever excepted habeas corpus petitioners who are represented by counsel from its delay rule.

The Court also rejects petitioner's argument that California's delay rule is inadequate because it is discretionary.

See Karis v. Vasquez, 838 F.Supp. 1449, 1462-64 (E.D. Cal. 1993). This Court "'takes state courts as it finds them'" (Howlett v. Rose, 496 U.S. 356, 372, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990)) because it is "not empowered by the Constitution to oversee or harness state procedural experimentation" (Chandler v. Florida, 449 U.S. 560, 582, 101 S.Ct. 563, 66 L.Ed.2d 740 (1981)).

The adequate state ground doctrine is an issue of constitutional law under the Supremacy Clause of the Constitution that "accords respect to state courts as decision makers by honoring their modes of procedure." Howlett v. Rose, 496 U.S. 356, 370, 367-68, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990); United States v. Burnison, 339 U.S. 87, 94, 70 S.Ct. 503, 94 L.Ed. 675 (1950). Neutral discretionary rules of judicial administration may form a "valid excuse for a state court's refusal to entertain a federal cause of action." Howlett v. Rose, supra, 496 U.S. at 374, 110 S.Ct. 2430, 110 L.Ed.2d 332; Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747 (1929).

A neutral state rule of judicial procedure may violate the Supremacy Clause of the Constitution "[w]hen a state refuses to hear pleas based on federally created rights while it takes cognizance of those created by state law[.]" United States v. Burnison, supra, 339 U.S. at 94, 70 S.Ct. 503, 94 L.Ed. 675. This type of disparate treatment may violate the Supremacy Clause of the Constitution since a "cause of action must not be discriminated against because it is a federal one." Herb v. Pitcairn, 324 U.S. 117, 123, 65 S.Ct. 459, 89 L.Ed. 789 (1945). Under such circumstances, "the state court may be evading federal law and discriminating against federal causes of action." Howlett v. Rose, supra, 496 U.S. at 366, 110 S.Ct. 2430, 110 L.Ed.2d 332; Demorest v. City Bank Co., 321 U.S. 36, 42, 64 S.Ct. 384, 88 L.Ed. 526 (1944); Broad River Power Co. v. South Carolina, 281 U.S. 537, 540, 50 S.Ct. 401, 74 L.Ed. 1023 (1930) .

The Court finds no evidence that the procedural bars invoked in this case were "set up as an evasion" (Rogers v. Alabama, 192 U.S. 226, 231, 24 S.Ct. 257, 48 L.Ed. 417 (1904)) by the California Supreme Court or reflect an "intent to avoid the Federal questions" (Vandalia Railroad v. South Bend, 207 U.S. 359, 367, 28 S.Ct. 130, 52 L.Ed. 246 (1907)).

Petitioner's showing that the California Supreme Court has not invoked procedural bars against other state habeas corpus petitioners presenting federal constitutional claims does not reveal any improper "discrimination" under the Supremacy Clause against federal constitutional claims. To the extent that California law and the practice of the California Supreme Court may allow unjustifiably delayed federal constitutional claims to be heard on the merits, the law and the practice reflect state judicial receptiveness to, not hostility toward, the presentation of federal constitutional claims.

"A state ground that is solidly established will be respected even though not 'strictly' followed. Any other approach would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disable the state from enforcing its procedural rules with respect to many others." Prijoda v. McCaughtry, 910 F.2d 1379, 1384 (7th Cir. 1990). "Uncertainty is not enough to disqualify a state procedural rule as one 'adequate' under federal law. If it were, states would be induced to make their rules draconian rather than to allow prisoners the latitude now available." Id. at 1385.

The Court finds petitioner's attack on California law unpersuasive because petitioner has, in effect, asked this Court to penalize the California Supreme Court for creating and applying neutral discretionary rules of procedure that sometimes allow otherwise untimely federal constitutional habeas claims to be heard on the merits. This Court has neither the authority nor the desire to induce the California Supreme Court to make its habeas corpus rules "draconian

rather than to allow prisoners the latitude now available." Prijoda v. McCaughtry, supra, 910 F.2d at 1385.

IT IS FURTHER ORDERED that Claims Number 31 and 32, which contain 4 subclaims, are dismissed as procedurally defaulted for the same reasons that the 37 claims have been defaulted. Given the California Supreme Court's explicit orders denying petitioner first two petitions for writ of habeas corpus in that court, the court finds a reasonable basis to conclude that all of the six claims contained in Claims Number 31 and 32 are likewise procedurally defaulted as untimely under California law. For the same reasons outlined as to petitioner's 37 claims described above, these six claims are dismissed.

The Court further finds that petitioner has failed to make any particularized showing of cause and prejudice or a fundamental miscarriage of justice to overcome the "presumption against federal habeas review of claims defaulted in state court." Coleman v. Thompson, supra, 501 U.S. at ___, 111 S.Ct. at 2563, 115 L.Ed.2d 640. Despite these failings, the Court grants petitioner's request in open court to make a more particularized showing of either cause and prejudice or a fundamental miscarriage of justice. McCleskey v. Zant, 499 U.S. ___, ___, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 544 (1990); Sawyer v. Whitley, 505 U.S. ___, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Petitioner may file a brief addressing these issues on or before July 29, 1994.

IT IS FURTHER ORDERED that Claims Number 16,18, 20 through 23, 25, 43 through 49, 51 through 54, 56, and 57 are dismissed because they are already before this Court in petitioner's petition for writ of habeas corpus filed on July 20, 1992. These claims have already been answered on the merits,

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traversed, and are under consideration by this Court. Petitioner may file supplemental briefing on these 20 claims on or before July 29, 1994. The Court will then decide if additional hearings or briefing is necessary.

Dated: APR 22 1994.

DICKRAN TEVRIZIAN

DICKRAN TEVRIZIAN
United States District Court Judge

Presented by:

"s/Keith H. Borjon".
KEITH H. BORJON, Supervising
Deputy Attorney General

Attorney for Respondent

APPENDIX C

CONSTITUTIONS, STATUTES OR REGULATIONS

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 2254 of title 28, United States Code, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH

As Adopted on June 6, 1989

POLICY 1. STAYS OF EXECUTION

The court will consider a motion for a stay of execution only if such a motion is made in connection with a petition for

a writ of habeas corpus filed in the court, or to permit certiorari review by the United States Court.

POLICY 2. WITHDRAWAL OF COUNSEL

The court will consider a motion to withdraw as attorney of record only if appropriate replacement counsel is ready and willing to accept appointment for appropriate postappeal representation related to the case.

POLICY 3. STANDARDS GOVERNING FILING OF HABEAS CORPUS PETITIONS AND COMPENSATION OF COUNSEL IN RELATION TO SUCH PETITIONS

For the reasons expressed therein, the court has adopted the following standards:

STANDARDS FOR PREPARATION AND FILING OF HABEAS CORPUS PETITIONS RELATING TO CAPITAL CASES AND FOR COMPENSATION OF COUNSEL IN CONNECTION WITH THOSE PETITIONS

The Supreme Court promulgates these standards as a means of implementing the following goals with respect to petitions for writs of habeas corpus relating to capital cases: (i) ensuring that potentially meritorious habeas corpus petitions will be presented to and heard by this court in a timely fashion; (ii) providing appointed counsel some certainty of payment for authorized legal work and investigation expenses, and (iii) providing this court with a means to monitor and regulate expenditure of public funds paid to counsel who seek to investigate and file habeas corpus petitions.

For these reasons, effective June 6, 1989, all petitions for writs of habeas corpus arising from judgments of death, whether the appeals therefrom are pending or previously resolved, are governed by these standards:

1. Timeliness standards

1-1. Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. All petitions for writs of habeas corpus should be filed without substantial delay.

1-1.1 A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 60 days after the final due date for the filing of appellant's reply brief on the direct appeal.

1-1.2 A petition filed more than 60 days after the final due date for the filing of appellant's reply brief on the direct appeal may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim.

1-1.3 Alternatively, a petition may establish absence of substantial delay if it alleges with specificity facts showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 (the date of finality of *In re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn. 1), the petition was filed within a reasonable time after that date.

1-2. If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

1-3. Any petition that fails to comply with these requirements may be denied as untimely.

2. Compensation standards

2-1. This court's appointment of counsel for a person under a sentence of death is for the following: (i) pleadings and proceedings related to preparation and certification of the appellate record; (ii) representation in the direct appeal before the California Supreme Court; (iii) preparation and filing of

habeas corpus petitions and other ancillary pleadings in the California Supreme Court; ((iv) preparation and filing of a petition for a writ of certiorari, or an answer thereto, in the United States Supreme Court; (v) representation in the trial court relating to proceedings pursuant to Penal Code sections 1193 and 1227; and (vi) preparation and filing of a petition for clemency with the Governor of California no earlier than after exhaustion of the initial round of collateral challenges in federal court. Absent prior authorization by this court, this court will not compensate counsel for the filing of any other motion, petition or pleading in any other California or federal court or court of another state. Counsel who seek compensation for representation in another court should secure appointment by, and compensation from, that court.

2-2. Appellate counsel should expeditiously investigate possible bases for filing a petition for a writ of habeas corpus. As a general rule, this investigation should be done concurrently with review of the appellate record and briefing on appeal. Requests by appointed counsel for investigation expenses shall be governed by the following standards:

2-3. On or before the date the appellant's opening brief on appeal is filed, or within 120 days after the date on which these standards are announced, whichever is later, counsel shall file with this court a "Confidential request for expenses to investigate potential habeas corpus issues." The court will entertain an initial request filed at a later time only if good cause for the delay is shown.

2-4. The confidential request for expenses shall set out:

2-4.1 The issues to be explored;

2-4.2 Specific facts that suggest there may be an issue of possible merit;

2-4.3 An itemized list of the expenses requested for each issue of the proposed habeas corpus petition; and

2-4.4 If applicable, an itemized listing of the fees and expenses previously submitted to, or approved or paid by, this

court in connection with the present (or any previous related) habeas corpus proceeding or investigation.

2-5. If the confidential request for expenses appears both timely and reasonable, the court will grant it in whole or in part. Except when good cause is shown, this court will not reimburse counsel for expenses that have not been previously approved by this court.

2-6. On presentation of an accounting of the fees and expenses incurred for production of the confidential request for expenses, the court will reimburse counsel up to $3,000 for reasonable expenses and legal fees associated with preparing that request. Prior authorization will not be required for reimbursement of these fees and expenses. Counsel may include this accounting as an attachment to the confidential request. In exceptional circumstances, counsel may request reimbursement for fees and expenses exceeding $3,000.

2-7. Counsel generally will not be awarded compensation for fees and expenses relating to matters that are clearly not cognizable in a petition for a writ of habeas corpus.

MOTION FILED
OCT - 8 1996

No. 96-355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden,

Petitioner,

vs.

MICHAEL ANGELO MORALES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Telephone: (916) 446-0345

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

20 pp

QUESTIONS PRESENTED

1. Where a state procedural default rule contains an exception for "good cause" or "sufficient reason," do the inherently uncertain contours of such a rule render it "inadequate" as an independent state ground of decision?

2. When a claim could be denied on either the merits or the procedural bar, does a state court's decision to deny on the merits constitute an inconsistent application of the bar, rendering the bar "inadequate" in cases where it is invoked?

3. Should the federal courts adopt such a restrictive view of the adequacy of state procedural bars that states are encouraged to adopt severe, rigid, exceptionless rules?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden,

Petitioner,

vs.

MICHAEL ANGELO MORALES,

Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

In the accompanying brief, *amicus* argues that the division of opinion between the Ninth Circuit in this case and the Seventh Circuit in *Prihoda* v. *McCaughtry* makes this case appropriate for review on certiorari. In addition, further clarification by this Court is needed to resolve apparent conflicts in this Court's prior opinions.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the

accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit's refusal to respect California's procedural default rules in *Siripongs* v. *Calderon*, 35 F. 3d 1308 (1994) and the present case has needlessly delayed enforcement of the state's death penalty, reducing its deterrent effect. Those delays are contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

October, 1996

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden,

Petitioner,

vs.

MICHAEL ANGELO MORALES,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Fifteen years ago, Michael Morales raped, tortured, and murdered Terri Winchell. He was convicted of these crimes and sentenced to death in 1983. *People* v. *Morales*, 48 Cal. 3d 527, 539-541, 770 P. 2d 244, 248-249 (1989). The conviction and sentence were affirmed seven years ago. *Id.*, at 573, 770 P. 2d, at 271. At about the same time, the California Supreme Court adopted standards requiring habeas petitions in capital cases to be filed in a timely manner. See *Morales* v. *Calderon*, 85 F. 3d 1387, 1388 (CA9 1996).

Even though California provides state habeas counsel in capital cases, Morales filed his first habeas petition in federal court, including 32 claims never presented in state court. *Ibid.* The federal district judge dismissed these claims without prejudice to allow their exhaustion in state court. *Ibid.*

Morales then filed two habeas petitions in the California Supreme Court, three and one-half years after affirmance on

direct appeal and after adoption of the California standards. The state court denied these petitions both on the merits and as untimely. *Id.*, at 1389-1390.

The district court found that the denial was based on adequate and independent state grounds and that Morales had not met the requirements for exceptions to the procedural default rule. *Id.*, at 1389. Hence, it dismissed these claims. *Ibid.* The Court of Appeals reversed, finding that California's procedural default rule was not "clear, consistently applied, and well-established." *Id.*, at 1393.

SUMMARY OF ARGUMENT

The decision below conflicts with the decision of the Seventh Circuit in *Prihoda* v. *McCaughtry*. That case recognized the value of flexible rules of waiver of default in state habeas cases and refused to declare a state rule "inadequate" because of the existence of such waivers. The present opinion, in contrast, will not regard a state rule as "adequate" unless the federal court can decide for itself whether the state courts are applying their own law correctly.

Certiorari should also be granted to clear up contradictions in this Court's prior opinions. The cursory, footnote treatment of the issue in *Dugger* v. *Adams* and the apparent conflict between the result of that case and language in *Hathorn* v. *Lovorn* will only breed confusion in lower courts until this Court provides further explanation.

The approach of the Ninth Circuit in the present case provides California with a powerful incentive to adopt a rigid rule of default with no exceptions. This approach should be rejected so that the state can consider late petitions when justice requires without losing the benefits of its procedural default rules in the bulk of cases.

ARGUMENT

I. The decision of the Ninth Circuit in the present case directly conflicts with the position of the Seventh Circuit on an important question of federal law.

A case is appropriate for review on certiorari "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . ." Supreme Court Rule 10.1. The present case is an exemplar of such a conflict.

Balancing the need for finality against the need to correct fundamental injustices, this Court has determined that a habeas petitioner seeking to raise a defaulted claim must show "cause" for the default. See *Francis* v. *Henderson*, 425 U. S. 536, 542 (1976). Not surprisingly, many state courts and legislatures have come to similar conclusions. Hence, California requires a showing of "good cause" for an untimely petition, see *Morales* v. *Calderon*, 85 F. 3d 1387, 1390 (CA9 1996) (quoting Supreme Court Policies Regarding Cases Arising from Judgments of Death, Standard 1-2 (1990)). Similarly Wisconsin requires "sufficient reason" for a successive collateral attack. *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1381 (CA7 1990) (quoting Wis. Stat. § 976.06(4)). These two very similar rules suffered very different fates at the hands of two different circuits.

The nub of the dispute is the requirement that the state rule be "strictly or regularly followed." *Barr* v. *Columbia*, 378 U. S. 146, 149 (1964).

> "A requirement of consistency poses special problems for forfeiture rules, because every state uses exceptions such as 'plain error' or 'sufficient reason' or even 'cause and prejudice' to deal with cases in which application of the ordinary rules would produce unacceptably harsh consequences." *Prihoda*, 910 F. 2d, at 1383.
>
> "Searching for 'regularity' in the state's employment of excuses and exceptions would embroil the federal court deeply in questions of state law and procedure. An alternative to the comprehensive survey of state cases every time a state invokes waiver is to recharacterize what it means for a state to apply its rule strictly. Both the Supreme Court and

> the inferior courts respect state procedural grounds unless they are regularly *dis*regarded (or seemingly have been manufactured for the occasion, as in *Johnson*). A state ground that is solidly established will be respected even though not 'strictly' followed. Any other approach would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disable the state from enforcing its procedural rules with respect to many others. Neither prisoners' interests nor the interest of federalism would be served by such a development." *Id.*, at 1384 (emphasis in original).

Prihoda claimed that the fact he was unrepresented in his first collateral attack was "sufficient reason" to consider a second, *id.*, at 1381, and claimed inconsistency in the Wisconsin courts' acceptance of that reason in some cases and rejection of it in others. *Id.*, at 1384. The Seventh Circuit rejected that argument, noting that other factors, such as the importance of the issue, were also involved. *Ibid.* Case-by-case judgment is required to implement such a rule.

> "The difficulty of drawing lines, especially under standards such as 'sufficient reason,' makes uncertain application inevitable. Uncertainty is not enough to disqualify a state's procedural ground as one 'adequate' under federal law. *If it were, states would be induced to make their rules draconian rather than to allow prisoners the latitude now available.*" *Id.*, at 1385 (emphasis added).

The opinion of the Ninth Circuit in the present case stands in stark contrast to the wisdom of *Prihoda*. Instead of recognizing the need for standards such as "good cause" and the benefits to prisoners of having them, the opinion begins by criticizing California's rule for not "set[ting] out criteria for determining 'good cause' to excuse such delay." *Morales*, 85 F. 3d, at 1391.

Then the opinion below makes this statement: "The vagueness of the Standards could have been *cured by narrowing judicial construction* in the years immediately following their issuance. We find no such cases, however." *Ibid.* (emphasis added). This concept is lifted straight from the cases on vagueness of statutes defining crimes or establishing eligibility for capital punishment. See, *e.g.*, *Richmond* v. *Lewis*, 506 U. S.

40, 47 (1992); *Kolender* v. *Lawson*, 461 U. S. 352, 355 (1983). The Ninth Circuit apparently believes that a rule granting *leniency* to a litigant who has defaulted his claim must be drawn with the same precision as a law which *sends* people to the gallows.

Later in the opinion, the Ninth Circuit acknowledges the value of discretionary rules, but then implies that only certain kinds of discretion will do. See *Morales*, 85 F. 3d, at 1392. Unless the state court establishes a body of case law laying out guidelines for the exercise of discretion, the Ninth Circuit will not find the requirement for an "adequate" state ground to have been met. *Ibid*. Because the California Supreme Court, like this Court, typically does not write opinions when it denies original habeas petitions, see *ibid*., that requirement is not going to be met.

In effect, the Ninth Circuit has created a presumption of irregularity, inverting the usual rule. Cf. *Parke* v. *Raley*, 506 U. S. 20, 29 (1992) ("presumption of regularity" "deeply rooted in our jurisprudence"). Not only must the procedural ground be stated in the individual case, as *Harris* v. *Reed*, 489 U. S. 255, 263 (1989) may require, but the California Supreme Court must now write opinions in *all* of its original habeas petitions so that the Ninth Circuit can "peer majestically over the [state] court's shoulder," *Lewis* v. *Jeffers*, 497 U. S. 764, 780 (1990) (quoting *Godfrey* v. *Georgia*, 446 U. S. 420, 450 (1980) (White, J., dissenting)), and supervise its application of *state* law.

The Seventh Circuit applies the opposite presumption. The general rule is that state procedural grounds will be respected. To breach this wall, the burden is on the habeas petitioner to show that the state rules "are regularly *dis*regarded (or seemingly have been manufactured for the occasion, as in *Johnson*)." *Prihoda*, 910 F. 2d, at 1384 (emphasis in original).

This issue has always been important. It is even more important now, after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, discussed in part III, *infra*. The conflict between *Prihoda* and the present case makes this an appropriate case for this Court's review.

II. Certiorari should be granted in this case to resolve contradictions in this Court's earlier opinions.

Hathorn v. *Lovorn*, 457 U. S. 255, 263 (1982) states that a procedural ground is adequate only if the state courts apply it evenhandedly "to all similar claims." Courts of appeals taking a restrictive view of the "adequacy" requirement have latched on to this phrase. See, *e.g.*, *Messer* v. *Roberts*, 74 F. 3d 1009, 1015 (CA10 1996).

Dugger v. *Adams*, 489 U. S. 401 (1989), however, appears to be inconsistent with the *Hathorn* rule, or at least with a strict interpretation of it. Adams claimed a violation of the rule of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), but he had not objected at trial, on appeal, or in his first round of state and federal collateral review. *Id.*, at 404-405. The state court held the claim was barred. *Id.*, at 405. The *Adams* dissent noted several cases in which similarly belated *Caldwell* claims had been considered and rejected on the merits, *id.*, at 416-420, and relied on the *Hathorn* rule. *Id.*, at 420.

The *Adams* majority only responded in a footnote. Even though *Hathorn* says "all," the *Adams* Court referred to "the vast majority of cases." *Id.*, at 411, n. 6. The majority says "the few cases that respondent [Adams] and the dissent cite do not convince us that the Florida Supreme Court fails to apply its procedural rule regularly and consistently." *Ibid.* Regrettably, the majority does not really say *why* they do not. As the dissent notes, the reasons the majority gives are not persuasive. *Id.*, at 418 (opinion of Blackmun, J.).

If *Adams* was correctly decided, as *amicus* CJLF firmly believes it was, further clarification of its rule is required. The apparent conflict between the statement in *Hathorn* and the result in *Adams* will only fester until it is resolved. No other court has the authority to overrule this Court's precedents, see *Hutto* v. *Davis*, 454 U. S. 370, 375 (1982) (*per curiam*), and so that resolution must be found here.

A clue to the resolution can be found at the end of *Adams*' discussion of the four Florida cases submitted as proof of inconsistent application.

> "Regardless of whether any of these cases might be subject to federal habeas review because of the lack of a plain statement that the decision was based on state law grounds, an issue we considered in *Harris* v. *Reed*, *ante*, at p. 255, we do not believe that they are sufficient to undercut the adequacy of the Florida procedural rule." *Adams*, 489 U. S., at 411-412, n. 6.

In other words, the effect on federal habeas of a state court's decision to rule on the merits and not on procedural grounds in the petitioner's *own* case is not the same as the effect of such a decision in *other* cases. These different facets of the procedural default doctrine must be examined in light of their different purposes.

When the state court's decision in the petitioner's own case is based on the merits and not on procedural default, then the state judgment does not, in fact, rest on state law. In such a case, the reason for the procedural default rule is simply absent, see *Harris* v. *Reed*, 489 U. S. 255, 262 (1989) (rule based on independent state ground doctrine), and the rule should not apply. For this purpose, it makes no difference whether the state court accepted or rejected the defendant's argument. The shield from federal review on certiorari or habeas is dropped either way. *Id.*, at 263 (habeas, claim rejected); *Michigan* v. *Long*, 463 U. S. 1032, 1044 (1983) (certiorari, claim accepted).

However, when the procedural ground was asserted in petitioner's case but not in others, the interests involved are different. There are two evils to be avoided here. One is a lack of fair notice. See *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963) ("no prior Georgia case . . . gives notice of the existence of [the] requirement"). When a state court lays out a course as proper in one case and then declares it a default in another, the defendant has been unfairly denied his day in court. See, *e.g.*, *Johnson* v. *Mississippi*, 486 U. S. 578, 587-588 (1988). The second problem is discrimination. A state rule should not be manipulated to discriminate against certain classes of defendants or claims. For example, in *Williams* v. *Georgia*, 349 U. S. 375 (1955), the state court held a claim of racial discrimination in jury selection to be defaulted, but relief on similarly late claims of nonracial jury selection irregularities had been granted in numerous cases. *Id.*, at 384-387.

For this latter purpose, it matters a great deal whether the claims in the other cases were accepted or rejected. In *Adams*, *supra*, the case of *Combs* v. *State*, 525 So. 2d 853, 856 (1988) was asserted as an inconsistent application of the state rule, because the state court addressed and rejected Combs' defaulted *Caldwell* claim. But the state court was not doing Combs any favors by this ruling. By addressing and rejecting his claim, the Florida Supreme Court cleared the way for the same instruction to be used again on retrial.[1] The trial judge might otherwise have been inclined, though not required, to follow contrary Eleventh Circuit precedent. See *id.*, at 856-857 (discussing and rejecting Eleventh Circuit cases).[2]

Frequently in the law, the moving party must clear more than one hurdle in order to obtain the relief he seeks. The general rule in such cases is that the court need not evaluate the case in any particular order. If the claim fails to clear one hurdle it may be rejected, and closer, more difficult questions need not be addressed.

Strickland v. *Washington*, 466 U. S. 668 (1984) is a prime example of this principle. The petitioner must show both unprofessional deficiency in counsel's performance and resulting prejudice. *Id.*, at 687. If the second element is clearly absent, the first need not be addressed. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*, at 697.[3]

---

1. Combs' penalty phase had to be retried for other reasons. *Id.*, at 855.

2. On a related point, *Coleman* v. *Thompson*, 501 U. S. 722, 743 (1991) held that a state court decision rejecting a claim on the merits and declining to decide a procedural bar question did not impair the "independence" of the state rule.

3. *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality) is an exception. That case established a prescribed order of issues (retroactivity first, "merits" second) only because the plurality felt this order to be required by the constitutional imperative of avoiding advisory opinions. *Id.*, at 316. As *Strickland* demonstrates, that is not required for other rules.

A similar situation commonly arises in belated and successive collateral attacks. Effective lawyers winnow out the weak claims and concentrate on those with a substantial probability of success. *Smith* v. *Murray*, 477 U. S. 527, 536 (1986). Those left-out, weak claims then appear in the belated filings, both defaulted and meritless. Federal default law is sometimes a "morass," making rejection on the merits the simpler course, see *Grubbs* v. *Delo*, 948 F. 2d 1459, 1463, n. 3 (CA8 1991), and the same is true in some states. In a state with discretionary exceptions for defaulted claims, the merits will often be clearer than the procedural bar question.

For example, after this Court's remand order in *Bacigalupo* v. *California*, 506 U. S. 802 (1992), many death row inmates filed challenges to an aspect of California's death penalty law which had long been regarded as settled. Rejection of these belated claims on procedural grounds would require resolution of the knotty problems of when novelty of a claim is "cause," see *Engle* v. *Isaac*, 456 U. S. 107, 131 (1982); *Reed* v. *Ross*, 468 U. S. 1, 13 (1984), and when failure to make a claim on appeal is ineffective assistance. See *Smith*, 477 U. S., at 535. But after *Tuilaepa* v. *California*, 129 L. Ed. 2d 750, 114 S. Ct. 2630 (1994), the substantive question is once again settled. A court would not in any way denigrate its own procedural default law by deciding that a controlling precedent on the merits was a clearer and simpler way to resolve the case.

This Court took that route on one of the claims in *Gray* v. *Netherland*, 135 L. Ed. 2d 457, 116 S. Ct. 2074 (1996). Gray had two complaints about certain penalty phase evidence in his case: a "notice-of-evidence" claim, that he had not received adequate notice, and a "misrepresentation" claim, that the prosecution had affirmatively misled him about the evidence. *Id.*, at 470, 116 S. Ct., at 2081. The state asserted procedural default on both aspects. Brief for Respondent in No. 95-6510, p. 39; see also Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in No. 95-6510, pp. 11-16. The concurring judge in the Court of Appeals had found the claim procedurally defaulted. *Gray* v. *Thompson*, 58 F. 3d 59, 67-68 (CA4 1995) (opinion of Hall, J.).

This Court found the record on procedural default of the misrepresentation claim sufficiently muddled to require a

remand. 135 L. Ed. 2d, at 472-473, 116 S. Ct., at 2082-2083. However, on the notice-of-evidence claim, this Court, like the Court of Appeals majority, simply skipped the procedural default issue and decided the case on *Teague* grounds. *Id.*, at 473-475, 116 S. Ct., at 2083-2085; 58 F. 3d, at 64-66. The closest precedent was contrary to the petitioner's position, 135 L. Ed. 2d, at 474, 116 S. Ct., at 2084, and thus the *Teague* bar was clear.[4]

Is *Gray* evidence that this Court and the Fourth Circuit fail to regularly and consistently apply the procedural default rule? Of course not.

Procedural default is a barrier to a *grant* of relief on the merits. It is not necessarily a barrier to *denial* of relief on the merits.[5] A court's decision to deny relief on another ground and not reach the procedural default question is not a failure to consistently apply its procedural rule. Common sense and judicial economy require that the massive tidal wave of claims being filed by habeas petitioners be resolved in the most expeditious manner possible, consistent with due process. When the petitioner's inability to clear one hurdle is apparent, examining the others is a pointless exercise.

In short, a state court does not act in disregard of its own procedural default rule unless it reaches a result contrary to that rule. A writ of certiorari in the present case is necessary to clarify this important point.

---

4. The dissent did not dispute that a claim based on short notice alone would be *Teague*-barred. See *id.*, at 483-484, 116 S. Ct., at 2091 (generally no right to notice of evidence, as opposed to issues, at all) (opinion of Ginsburg, J.). The dissent objected instead to the separation of the two aspects of the claim and would have based a contrary decision on the "misrepresentation" aspect. See *id.*, at 482, 116 S. Ct., at 2090.

5. For the exhaustion rule, this distinction is now in the statute. See 28 U. S. C. § 2254(b)(2), as amended Pub. L. 104-132, § 104, 110 Stat. 1214, 1218.

III. The approach of the Ninth Circuit establishes a perverse incentive for states to adopt draconian policies.

California is in its present predicament because of the relative generosity of its procedural default rule. The Ninth Circuit's decision in the present case furnishes a powerful incentive to scrap that rule and establish a severe, rigid, exceptionless cutoff. Such a development would not serve the interests of justice. *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1385 (CA7 1990); cf. *Sandin* v. *Conner*, 132 L. Ed. 2d 418, 428-429, 115 S. Ct. 2293, 2299-2300 (1995) (states may be discouraged from adopting desirable rules if that adoption breeds federal litigation).

The California rule establishes a "safe harbor" for petitioners within which their petitions will be presumed timely, but it also allows a petitioner to show that a later petition was timely or that there was good cause for delay. See *Morales* v. *Calderon*, 85 F. 3d 1387, 1390 (CA9 1996). The decision below found this too vague. *Id.*, at 1391. An alternative which would surely pass muster on "vagueness" grounds would be a rule that *all* claims with *no* exceptions must be filed by a fixed date.

In a unitary system, such a severe curtailment of habeas corpus would not be one that *amicus* CJLF or other responsible anticrime groups would support. Such action may be necessary, however, to stop the delays and the drain of resources which will follow from this decision.

When a claim is filed in federal habeas, it must fit in one of three categories, based on its history in state court: resolved on the merits, unexhausted, or procedurally defaulted. Unexhausted claims must be dismissed or denied on the merits. 28 U. S. C. § 2254(b), as amended by Pub. L. 104-132, § 104, 110 Stat. 1214, 1218. Claims resolved on the merits will only be reviewed for reasonableness. *Id.*, subd. (d). Defaulted claims will be denied unless the "cause and prejudice" or "actual innocence" test is met. *Murray* v. *Carrier*, 477 U. S. 478, 495-496 (1986) (unchanged by the new legislation).

Under this system, federal habeas should be vastly less expensive and time-consuming than it has been to date. Full-scale federal review of a claim should be a relatively rare event. Determining that another court's decision falls inside the range

in which reasonable judges can differ is far simpler than deciding the underlying question *de novo*.

The benefits of this reform will not be realized, however, if the federal courts routinely review *de novo* every defaulted claim under the assertion that the state's default rule is inadequate. To avoid that disaster, the state will be forced to err on the side of severity.

Simple rules tend to be harsh rules; rules that take into account the myriad variations of real cases tend to be complex and uncertain. Compare *Coleman* v. *Thompson*, 501 U. S. 722, 740 (1991) (30-day deadline, unwaivable) with *In re Clark*, 5 Cal. 4th 750, 779-780, 855 P. 2d 729, 748 (1993) (ineffective assistance of habeas counsel will be considered, even though not constitutionally required). California can make its rules clear and simple if that is what the federal courts really require. The result, however, will definitely *not* be in the long-term best interests of habeas petitioners as a class.

CONCLUSION

The petition for writ of certiorari should be granted.

October, 1996

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

ORIGINAL

No. 96-355

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

Arthur Calderon, Petitioner

v.

Michael Angelo Morales, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

David A. Senior*
CONDON & FORSYTH
1900 Avenue of the Stars
Suite 650
Los Angeles, California 90067
Telephone: (310) 557-2030
Attorneys for Respondent
Michael A. Morales

* Counsel of Record

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QUESTION PRESENTED

Whether this Court should restructure the procedural default doctrine so that a state court's arbitrary application of certain discretionary procedural "guidelines" may be deemed adequate and independent to bar federal habeas review.[1]

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[1] The California Supreme Court's timeliness guidelines are set forth in Morales v. Calderon, 85 F.3d 1387, 1390 (9th Cir. 1996), and in the petition at Appendix C.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Michael A. Morales (hereinafter "Morales") respectfully requests that the Court deny the petition for writ of certiorari seeking review of the judgment of the Court of Appeals for the Ninth Circuit that reversed the district court's order dismissing, on procedural grounds, every extra-record habeas corpus claim raised by Morales.

The opinion of the Court of Appeals reversing the district court's order is reported at Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996). The district court's order is not reported, but is printed as Appendix B to the petition.

STATEMENT OF THE CASE

1. Nature of the Case.

This action involves a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 raising numerous federal constitutional challenges to the conviction and sentence of death received by Morales in the Superior Court of the State of California, County of Ventura, in 1983.

2. The Course of Proceedings.

On June 14, 1983, Morales was sentenced to death following his conviction for one count of first degree murder [Cal. Penal Code § 187], with the special circumstance of lying

in wait [Cal. Penal Code § 190.3(a)(15)].[2] On February 22, 1984, the California Supreme Court appointed counsel "to represent appellant on his automatic appeal now pending in this court." People v. Morales, Crim. No. 23153 (Cal. Feb. 22, 1984) (minute order).[3] The judgment and sentence were affirmed on appeal, People v. Morales, 48 Cal. 3d 527 (1989), and the state supreme court's remittitur issued on June 1, 1989.

Five days later, the California Administrative Office of the Courts issued a news release entitled "Supreme Court Adopts Policies Regarding Cases Arising From Judgments of Death." A.O.C. News Release # 40 (June 6, 1989). Included among these "policies" were a set of Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and for Compensation of Counsel in Connection With Those Petitions. Under the provisions of Standard 1, entitled "Timeliness Standards," the scope of appellate appointments was expanded, apparently retroactively as well as prospectively, to include the

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[2] The trial court vacated a torture-murder special circumstance finding for lack of evidence. On appeal, the California Supreme Court reinstated the finding. People v. Morales, 48 Cal. 3d 527, 562 (1989).

[3] Appointment orders entered at that time did not refer to habeas corpus proceedings because habeas primarily was a post-affirmance remedy at that time. See generally D. Fischer & R. Lynn, Appeals and Writs in Criminal Cases § 2.116 (C.E.B. 1982). Because California shifted to a "unitary" appeal and habeas system after the affirmance in Morales's case, current appointment orders typically state that counsel is "appointed to represent appellant on his automatic appeal now pending in this court, including any related habeas proceedings." See, e.g., People v. Dent, No. S024645 (Cal. Jan. 20, 1995); People v. Sapp, No. S023628 (Cal. Jan. 19, 1995).

"duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus." For reasons not clear from the record, counsel never filed a petition for writ of habeas corpus on Morales's behalf,[4] and Morales's first and only state-court petition was filed only after appointment of new counsel in federal court.[5]

On April 24, 1991, the district court granted Morales's request for appointment of counsel to prosecute a federal habeas corpus proceeding on his behalf, and appointed present counsel, who had not represented Morales in state court proceedings. On July 20, 1992, counsel filed in the district court a petition for writ of habeas corpus consisting of 52 claims. Twenty of these were claims exhausted during Morales's automatic appeal and raised legal issues based solely on the trial record. The remaining 32 claims were based on facts outside the trial record

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[4] In a declaration filed in the California Supreme Court in February 1993, counsel stated that "[a]t the time I received [my] appointment, it was my understanding and belief that issues or claims to be set forth in petitions for writ of habeas corpus could be filed, if necessary, upon the conclusion of the direct appeal proceedings. . . . [B]ecause I never sought appointment to represent Mr. Morales in habeas corpus proceedings . . . I never have believed that I was counsel of record for Mr. Morales with respect to such proceedings. It always has been my understanding that a petition for writ of habeas corpus would be a separate proceeding with a separate case number, and hence a different action which would require a separate proceeding appointing counsel on Mr. Morales' behalf."

[5] Morales was not the only condemned petitioner in this position. His state-court petition was preceded by three others in the same posture. See In re (Gary) Howard, S013984; In re McClain, S020204; In re (Calvin) Coleman, S023949, each of which, as discussed, infra, was treated as timely by the California Supreme Court.

and were discovered by present counsel after his federal court appointment to the case.

On November 16, 1992, the district court dismissed the 32 unexhausted extra-record claims without prejudice and ordered Morales to present the claims to the California Supreme Court within thirty days. On December 16, 1992, Morales filed these claims (and an additional, newly-discovered claim) in a first petition for writ of habeas corpus in the California Supreme Court. On April 19, 1993, before the State filed an informal response to the petition, Morales filed a supplement to that petition containing newly-discovered facts for three previously filed claims, and adding three claims that were discovered since the original filing. This amendment to the petition was docketed under a second case number.

The State opposed each and every one of Morales's claims on timeliness grounds, asserting that the supporting facts could have been discovered during the pendency of the automatic appeal, despite the duty to investigate being imposed after Morales's direct appeal was over. Despite the California Supreme Court's prior history of treating habeas corpus petitions filed in this procedural posture as timely, see In re (Gary) Howard, S013984 (Cal. Sept. 20, 1990)[6]; In re (Calvin) Coleman, S023949

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[6] Newly-appointed federal counsel filed petitioner's first state-court petition for writ of habeas corpus approximately one year after federal-court appointment.

(Cal. Jun. 10, 1992)[7]; In re McClain, S020204 (Cal. Jan. 13, 1993)[8], on July 28, 1993, the California Supreme Court denied Morales all relief, issuing identically-worded orders under each case number, which read: "Petition for writ of habeas corpus denied on the merits and as untimely. (See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Stds. 1-1.1 to 1-3; In re Stankewitz (1985) 40 Cal.3d 391, 396, fn. 1.)"[9]

The next day, the California Supreme Court issued its decision in In re Clark, 5 Cal. 4th 750 (1993), in which a review of the "law governing collateral attacks on judgments of conviction by petition for writ of habeas corpus" led the court to a simple, but important, conclusion: "no clear guidelines have emerged in our past cases." Id. at 763. The Clark court then announced, apparently reversing the view evidenced by the orders in Coleman, Howard, and McClain, supra, that federal change of counsel is irrelevant to questions of timeliness, as is the result of a federal investigation undertaken "in response to McCleskey [v. Zant, 499 U.S. 467 (1991)]." Id. at 775.

Thereafter, Morales filed a first amended petition in

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[7] Newly-appointed federal counsel filed petitioner's first state-court petition for writ of habeas corpus approximately one year after federal-court appointment.

[8] Newly-appointed counsel filed petitioner's first state-court petition for writ of habeas corpus one year and four months after federal-court appointment.

[9] In addition, Justice Mosk dissented as to one of the orders, stating that "an order to show cause should issue."

the district court, which included these 36 newly-exhausted claims, plus two more claims attacking the constitutionality of the California death penalty statute. On April 11, 1994, the State moved to dismiss the amended petition on grounds of procedural default. The district court granted the motion and, on April 29, 1994, entered an order finding the state supreme court's invocation of the timeliness policy to be an "adequate and independent" state ground for decision, and dismissing the 37 [sic 38] newly-exhausted claims in Morales's first amended petition with prejudice. Petition for Writ of Certiorari, Appendix B. The district court granted Morales leave to brief the "cause and prejudice" and "fundamental miscarriage of justice" exceptions to the procedural default doctrine. Id. at 9.

On August 18, 1994, Morales moved for reconsideration of the dismissal on authority of Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), which was decided after the district court's initial decision. The district court denied reconsideration, but granted a request to certify the issue for interlocutory appeal, which was heard concurrently with the motion for reconsideration, and was granted unopposed.

On October 11, 1994, Morales sought permission from the Court of Appeals to file an interlocutory appeal pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1292(b). The Ninth Circuit granted permission to appeal, and subsequently reversed.

3. Disposition in the Court Below.

On June 4, 1996, the Ninth Circuit Court of Appeals reversed the district court's order, holding that the California state policies regarding the timely filing of habeas corpus petitions in cases arising from judgments of death were not adequate to bar federal review of constitutional claims. Relying in part on a concession by the California Supreme Court that "'no clear guidelines [regarding departure from the habeas corpus rules] have emerged in our past cases'" (Morales v. Calderon, 85 F.3d 1387, 1391 (9th Cir. 1996)(quoting In re Clark, 5 Cal. 4th 750, 763 (1993))), the Ninth Circuit found "so much variation in application of California's timeliness requirements . . . that no discernible clear rule then existed . . . ." Id. at 1391. In this regard, because "California's rule on timeliness was not 'clear, consistently applied, and well-established' at any time after Morales's convictions were affirmed and before he filed his first state habeas petition" (citation omitted), the rule "cannot serve as an adequate and independent state ground sufficient to support a procedural default." Id. at 1393.

On August 30, 1996, the State filed a petition for writ of certiorari, which was placed on this Court's docket on September 9, 1996, seeking review of the decision of the Court of Appeals.

REASONS WHY THE PETITION SHOULD BE DENIED

The Court of Appeals properly determined that the state court's invocation of its timeliness "policies" to deny in its entirety Morales's first and only petition for writ of habeas corpus was "inadequate" to bar federal court review. The timeliness policies are impermissibly vague, entirely discretionary, and applied arbitrarily and haphazardly, and were used for the first time in Morales's case to reach a wholly unprecedented result. Under long-standing doctrine of this Court, each of these reasons, considered individually, compels the conclusion that Morales is not barred from federal habeas corpus review of his claims.

The State's request for a complete overhaul of the adequate and independent state ground doctrine as it applies to federal habeas corpus should be rejected. This Court consistently has held that the only difference between the application of the doctrine to direct review cases and habeas cases is that it is applied more leniently in habeas corpus, not more rigidly as the State would have it. The State's "pre-emption" formulation of the doctrine for habeas corpus would render it a virtual nullity and upset this Court's carefully constructed balance of comity by allowing even the most arbitrary state procedural rules to bar federal court review.

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1. **"Adequacy" and State Procedural Defaults.**

Under the adequate and independent state ground doctrine, this Court has no jurisdiction on direct review over a state court decision resolving federal questions if the judgment rests on a state law ground that is "independent" of the federal question and "adequate" to support the judgment. See, e.g., Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1872). Procedural as well as substantive rules can function adequately and independently. See, e.g., Herndon v. Georgia, 295 U.S. 441 (1935).

The procedural default doctrine governing federal habeas corpus cases is derived from this doctrine, see Wainwright v. Sykes, 433 U.S. 72 (1977); Coleman v. Thompson, 501 U.S. 722 (1991), and is applied in the same fashion, Harris v. Reed, 489 U.S. 255 (1989), with one important difference. The doctrine governing direct review regarding the restriction is jurisdictional, whereas the doctrine governing habeas is merely jurisprudential. Coleman v. Thompson, 501 U.S. at 730-31; Wainwright v. Sykes, 433 U.S. at 83. Thus, the habeas corpus decisions of this Court repeatedly emphasize that a state procedural default will bar federal habeas corpus relief only where the state ground for decision is "adequate," see, e.g., Harris v. Reed, 489 U.S. at 261-62; Coleman v. Thompson, 501 U.S. at 736 ("federal habeas courts must ascertain for themselves if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds"), and cite

without hesitation direct review cases setting forth these criteria for judging adequacy. See, e.g., Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989) (discussed infra); Harris v. Reed, 489 U.S. at 261 n.6 (expressly incorporating the Johnson v. Mississippi, 486 U.S. 578 (1988), "even-handed application" test of adequacy that was applied by the Ninth Circuit in the instant case.)

Throughout these proceedings, Morales has argued numerous challenges to the California Supreme Court's invocation of a procedural bar in his case: (1) the timeliness requirements under state law are utterly vague and confusing; (2) the timeliness policies, devoid of any reference to objective criteria, are wholly discretionary; (3) the state court applies the timeliness policies in a seemingly arbitrary and haphazard manner; (4) the procedural requirement was not in effect at the time of the alleged default, as the policies were adopted after Morales's appeal was decided; and (5) the policies were applied in a new and unexpected manner in Morales's case in that each of the three state court habeas petitions filed by the petitioners in the same procedural posture as Morales were deemed timely filed. Each of these challenges finds authoritative support in the decisions of this Court. See, e.g., County Court of Ulster County v. Allen, 442 U.S. 140, 150 (1979) (federal review not barred where state "ha[d] no clear contemporaneous-objection policy that applie[d] in this case"); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 233-34 (1969); Johnson v. Mississippi,

486 U.S. 578, 588-89 (1988) ("[W]e cannot conclude that the procedural bar relied on by the [state court] in this case has been consistently or regularly applied. Consequently, under federal law it is not an adequate and independent state ground for affirming petitioner's conviction." (footnote omitted)); Hathorn v. Lovorn, 457 U.S. 255, 263 (1982)("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims."); Ford v. Georgia, 498 U.S. 411, 423 (1991)(quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958))("'Novelty in procedural requirements cannot be permitted to thwart review . . . applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights'").

The State now abandons all contentions that the procedural bar imposed in Morales's case passes the criteria for "adequacy" articulated in these decisions, and instead petitions for a writ of certiorari to eliminate the asserted uncertainty regarding "adequacy" and the procedural default doctrine and/or to refashion the doctrine to include only the lone test it believes that the bar can pass: constitutionality of the state procedure. For the reasons set forth below, the State's petition for certiorari on these grounds should be denied.

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2. This Appeal Does not Involve an Important Question of Federal Law Which Must be Settled by This Court.

A petition for writ of certiorari regarding the assessment of whether a state procedural rule is clear and regularly enforced does not involve an important question of federal law which must be resolved by this Court. The State incorrectly proffers that this case presents a unique opportunity for the Court to decide whether the adequacy of a state procedural rule in a habeas corpus case should be measured by whether the rule is "consistently or regularly applied"; to wit, the standard uniformly applied by this Court in determining the adequacy of a state procedural rule. See, e.g., Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982); Barr v. City of Columbia, 378 U.S. 146, 149 (1964). No unique opportunity exists in this regard in that this Court already has held, in a habeas corpus case, that an adequate state rule used to bar federal review must be consistently or regularly applied. Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989).[10] The use of this standard by the Court wholly undermines the State's contention that this Court needs to

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[10] Petitioner incorrectly contends that this Court never has applied the "consistently and regularly applied" adequacy standard to a 28 U.S.C. § 2254 case, and rejected this standard in Dugger. Petition at 16 n.4. In fact, this Court did not reject this standard, but applied the standard in denying respondent relief, noting that the Florida state court faithfully applied its procedural rule with only a few exceptions. By contrast, the Court of Appeals noted in this case, without dispute by petitioner, that the California Supreme Court did not "consistently and regularly" enforce its rule; but applied the rule only in the breach, with respondent's case being one of the few applications. Morales, 85 F.3d at 1391.

consider whether this well established and uniformly applied standard should be applied to habeas corpus cases. The Court's application of the "consistently applied" and "regularly followed" standard in Dugger has created a uniform application of this adequacy test by all lower courts.

In this regard, no issue set forth in the petition remains unanswered by the Court, and no confusion has occurred with respect to the lower courts' understanding and application of this adequacy test. Accordingly, the petition should be denied.

3. There are no Conflicts in the Courts Below.

Remarkably absent from the State's analysis is that, consistent with the Court of Appeals' decision in this case, every federal circuit has stated in a habeas corpus proceeding that only those state rules that are consistently enforced are adequate to support a finding of procedural default. See Breest v. Perrin, 655 F.2d 1, 3 (1st Cir.), cert. denied, 454 U.S. 1059 (1981); Wedra v. LeFevre, 988 F.2d 334, 340 (2d Cir. 1993); Reynolds v. Ellingsworth, 843 F.2d 712, 719 (3d Cir.), cert. denied, 488 U.S. 960 (1988); Smith v. Dixon, 14 F.3d 956, 972 (4th Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 129 (1994); Hill v. Black, 932 F.2d 369, 373 (5th Cir. 1991); Warner v. United States, 975 F.2d 1207, 1213 (6th Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 1314 (1993); Rosa v. Peters, 36 F.3d 625, 633 (7th Cir. 1994); Grubbs v. Delo, 948 F.2d 1459, 1463

(8th Cir. 1991), cert. denied, ___ U.S. ___, 113 S. Ct. 109 (1992); Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1175 (1995); Klein v. Neal, 45 F.3d 1395, 1398 (10th Cir. 1995); Cochran v. Herring, 43 F.3d 1404, 1408 (11th Cir. 1995). No circuit ever has rejected consistency of application as a test of adequacy.

The State even conceded before the Court of Appeals that evenhandedness is relevant to adequacy; however, it claimed that this Court prefers consistency only in situations where an identifiable federal right preempts a state rule or where application of the state rule specifically works to evade federal questions.[11] The State thereby attempts to swallow the consistency requirement within its narrow scheme predicated entirely on a misreading of Howlett v. Rose, 496 U.S. 356 (1990).

In Howlett, this Court simply reversed the judgment of the state court on the ground that the state court's "refusal to entertain one discrete category of § 1983 claims, when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause." Id. at 375. Howlett did not involve the jurisdiction of a federal court to review a federal question forfeited in state court, but only the duty of a state court to entertain a federal claim in the first instance. Howlett also did not involve the infinity of federal challenges to state-court rules, but only Supremacy Clause challenges. Far from the facts that exist here, the Court of Appeals correctly

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[11] See Appellee's Brief at 31.

noted that the State's reliance upon Howlett was inapposite. Morales v. Calderon, 85 F.3d at 1391-92.

The requirement of consistency rests on a less esoteric principle than that advanced by the State; namely, that litigants should understand binding rules. They should not lose their day in federal court because of rules, such as California's timeliness requirements, that are haphazardly applied. The consistency criterion arose because judges were concerned that state judges would arbitrarily erect obstacles to avoid federal questions. Courts understood that judges would never admit such a motive, so consistency became a kind of proxy for determining whether judges were discriminating. But that is not to say that the consistency requirement has no other rationale. This Court frequently requires consistency without regard to possible federal right preemption or evasion. See Johnson v. Mississippi, 486 U.S. 578, 586 (1988). For these reasons, the petition should be denied.

4. Federalism and Comity Do Not Permit Arbitrary and Haphazardly Applied, Albeit Facially Constitutional, State Rules of Procedure to Bar Federal Habeas Corpus Review.

With this petition for writ of certiorari, the State seeks to set aside the myriad decisions of this Court - Ford v. Georgia, 498 U.S. 411 (1991); Dugger v. Adams, 489 U.S. 401 (1989); Harris v. Reed, 489 U.S. 255 (1989); Johnson v.

Mississippi, 486 U.S. 578 (1988); Hathorn v. Lovorn, 457 U.S. 255 (1982); County Court of Ulster County v. Allen, 442 U.S. 140 (1979); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) - in favor of the creation of what it terms the "pre-emption formulation." Under its view of the law, all state procedural grounds for decision would be deemed "adequate" in habeas corpus cases unless the application of the state rule constituted an independent constitutional violation.

Simply stated, this is a misguided view of what the law is, or ought to be. "State grounds may be found inadequate without descending to a denial of due process." 16 Charles A. Wright et al., Federal Practice and Procedure: Jurisdiction § 4025 (1977). Indeed, it appears that the State's real request is for this Court to conflate the separate requirements of adequacy and independence. "[S]tate procedure can never be independent of the requirements of due process. There would be . . . jurisdiction to review a state decision that refused consideration of any claim, state or federal, on procedural grounds that fell below due process requirements." Id.

The State has identified no reason that the requirement of an "adequate" state ground for decision be eliminated (or virtually eliminated) from habeas corpus cases. The governing principles of comity and federalism are the same in both instances. See Wainwright v. Sykes, 433 U.S. 72 (1977). "Faced with a common problem, we adopt[ed] a common solution." Coleman v. Thompson, 501 U.S. at 734 (quoting Harris v. Reed, 489 U.S. at

263). This Court traditionally has rebuffed attempts to apply the independent and adequate state ground doctrine more deferentially in habeas corpus proceedings than on direct review, see Harris v. Reed, 489 U.S. at 255, for the very sound reason that the doctrine, as applied in habeas corpus proceedings, is non-jurisdictional. Coleman v. Thompson, 501 U.S. at 730-31.

Nothing in doctrines of comity or federalism permits the barring of federal habeas corpus review by arbitrary, haphazard, or otherwise "inadequate" state court grounds for decision. This Court should reject the State's attempt to rewrite the rules of federal procedure to do just that. The petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, respondent Michael A. Morales respectfully requests that this Petition for Writ of Certiorari be denied.

Dated: October 9, 1996

Respectfully submitted,

David A. Senior*
CONDON & FORSYTH
1900 Avenue of the Stars
Suite 650
Los Angeles, California 90067
Telephone: (310) 557-2030
Attorneys for Respondent
Michael A. Morales

* Counsel of Record

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and not a party to this action; my business address is 1900 Avenue of the Stars, Suite 650, Los Angeles, California 90067.

On October 9, 1996, I served the foregoing document described as **RESPONDENT'S BRIEF IN OPPOSITION** on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in a sealed envelope addressed as follows:

Daniel E. Lungren, Attorney General
Keith H. Borjon, Supervising Deputy Attorney General
300 South Spring Street
Los Angeles, California 90013

[X] **(By Mail)**: I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

[ ] **(By Mail)**: As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after deposit for mailing in affidavit.

[ ] **(By Personal Service)** I caused such envelope to be delivered by hand to the offices of the addressee above.

[ ] **(State)**: I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] **(Federal)**: I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on October 9, 1996, at Los Angeles, California.

CYNTHIA KELLEY

ORIGINAL

ORIGINAL

No. 96-355

Supreme Court, U.S.
FILED
NOV 4 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

Arthur Calderon, Petitioner

v.

Michael Angelo Morales, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE; SUPPLEMENTAL BRIEF IN OPPOSITION

David A. Senior*
CONDON & FORSYTH
1900 Avenue of the Stars
Suite 650
Los Angeles, California 90067
Telephone: (310) 557-2030
Attorneys for Respondent
Michael A. Morales

* Counsel of Record

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COMES NOW respondent, Michael A. Morales, by and through his attorneys of record, David A. Senior, CONDON & FORSYTH, and hereby opposes the motion of the Criminal Justice Legal Foundation for leave to file a brief amicus curiae. The request to appear amicus curiae should be denied because its brief is devoted almost entirely to issues not presented by this case and is intended only to obfuscate those which are properly before this Court. Amicus curiae additionally relies on disputed facts not raised or litigated below, which, being raised too late, find no factual support in the record.

In the alternative, Morales submits this pleading as a supplemental brief in opposition to address the new issues argued for the first time in the brief amicus curiae. See Rule 15.7.

I

THERE ARE NO CONFLICTS IN THE COURTS BELOW

Amicus curiae's first argument is that certiorari should be granted to resolve an alleged inter-circuit conflict. See Brief of Amicus Curiae at 3-5. This argument is premised entirely on the contention that the instant case is distinguished from Prihoda v. McCaughtry, 910 F.2d 1379 (7th Cir. 1990), only

by its alleged contrary result. Amicus curiae is, quite simply, wrong. Prihoda involved a very different set of legal and factual issues, ones not present in this case.

The issue in Prihoda was whether the mere existence of a "good cause" exception to a clear state procedural requirement automatically violated the "strict adherence" formulation of the adequate and independent state ground doctrine articulated by Barr v. Columbia, 378 U.S. 146 (1964). The petitioner in Prihoda had violated the straightforward state-law procedural requirement, contained in Wis. Stat. § 974.06(4), that "all grounds for relief available to a prisoner . . . must be raised in his original, supplemental or amended motion [for collateral relief]." Prihoda v. McCaughtry, 910 F.2d at 1381. The petitioner's second motion for collateral relief was denied on procedural grounds, notwithstanding petitioner's contention that his pro se status during the prior proceeding constituted "good cause" for a successive motion for collateral relief.

In the Seventh Circuit, the petitioner relied on Barr v. Columbia, 378 U.S. 146 (1964) to argue that the existence of a "good cause" exception to the rule rendered its enforcement insufficiently "strict" to constitute an adequate and independent state ground for decision. In the alternative, petitioner set

forth a single example from ten years earlier, State v. Willis, 69 Wis. 2d 489, 230 N.W.2d 827 (1975)(a second motion for collateral relief was entertained partially because the first motion had been filed pro se), to attempt to demonstrate that the state court had failed to administer the exception evenhandedly.

Despite amicus curiae's emphatic assertions, there is no disagreement between the Ninth and Seventh Circuits. The Seventh Circuit's general view of the adequate and independent state ground doctrine, as expressed in Prihoda, is entirely consistent with the Ninth Circuit's:

> A state ground is "adequate" only if the state court acts in a consistent and principled way. A basis of decision applied infrequently, unexpectedly, or freakishly may be inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted.

Prihoda, 910 F.2d at 1383 (citing Johnson v. Mississippi, 486 U.S. 578 (1988); Barr v. Columbia, 378 U.S. 146 (1964); Howlett v. Rose, 496 U.S. 356 (1990)). Furthermore, there is nothing in the instant case that suggests the slightest disagreement with Prihoda's view that "[a] rule of forfeiture-unless-good-reasons may be 'strictly' followed when the state is scrupulous about treating particular reasons as 'sufficient' routinely and others as insufficient with equal regularity." Id. at 1384.

Morales demonstrated below (as well as in his Brief in Opposition filed in this Court) that the routine practice of the California Supreme Court, until the decision in his case, was to treat all petitions involving the circumstances of the instant case as timely filed. Unlike the Prihoda petitioner's reliance on a single deviation from the state-court rule (based only in part on his own similar circumstances), Morales's showing is supported by an examination of California Supreme Court rulings in every state court petition filed under similar circumstances.

That showing led below to the inescapable conclusion that the state court's application of the timeliness guidelines was entirely without rhyme or reason.[1] Indeed, the very day after the denial of Morales's claims for habeas corpus relief, the California Supreme Court stated that "no clear guidelines" could be discerned from its prior application of its habeas policies. In re Clark, 5 Cal. 4th 750, 763 (1993). The state no longer makes any contention to the contrary.

Amicus curiae would have this Court believe that the

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[1] Similar showing led numerous district courts to the same conclusion, well before the Ninth Circuit's decision. See, e.g., Murtishaw v. Vasquez, CV-F-91-508-OWW (E.D. Cal. Feb. 19, 1993); McDowell v. Vasquez, CV-90-4009-MRP (C.D. Cal. Apr. 8, 1993); Kimble v. Vasquez, CV-90-4826-SVW (C.D. Cal. Aug. 2, 1993); Allen v. Calderon, CV-S-88-1123-DFL (E.D. Cal. Sept. 30, 1994).

application of the state-court timeliness guidelines in this case were found "inadequate" simply because they admit to certain "good cause" exceptions. Little could be further from the truth.

California clearly has no "rule" in any traditional sense regarding the time for filing petitions for writs of habeas corpus. At the time of Morales's state procedural default, California had, by the state supreme court's own admission, no clear guidelines regarding the timely filing of a petition for post-conviction relief. After disposition of Morales's appeal, the state adopted guidelines intended to require habeas petitions to be filed before disposition on an appeal. Pursuant to those guidelines, all petitions for writs of habeas corpus "should be filed without substantial delay." See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to such Petitions, 1-1. The absence of substantial delay "may [be] establish[ed]" by the allegation of specific facts "showing that the petition was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim." Id. at 1-1.2. "A petitioner may establish good cause

[for substantial delay] by showing particular circumstances sufficient to justify substantial delay." Id. at 1-1.2. "Any petition that fails to comply with these requirements may be denied as untimely." Id. at 1-3.

The essence of what these guidelines provide is that where a petition is filed more than 90 days after the filing of the reply brief in the automatic appeal (an event which in Morales's case predated the promulgation of the guidelines by several years), it will be treated as timely whenever the California Supreme Court determines, in an entirely subjective and post hoc fashion, that the filing occurred at an appropriate time. Thus, the issue in this case is not that argued by amicus curiae -- whether a clear and well-established procedure requirement becomes "inadequate" by a state court's discretion to forgive a default either for good cause shown or in the interests of justice.

Consequently, leave to file the brief amicus curiae should be denied. In the alternative, the Court should reject the arguments of amicus curiae by denying the petition for writ for certiorari.

II

THERE ARE NO CONTRADICTIONS IN THIS COURT'S EARLIER OPINIONS

The next section of amicus curiae's brief is an excursion through the alleged "fester[ing]" inconsistency between Hathorn v. Lovorn, 457 U.S. 255 (1982), and Dugger v. Adams, 489 U.S. 401 (1989). According to amicus curiae, certiorari should be granted to repudiate Hathorn's requirement of evenhanded application to "all similar claims," see Hathorn v. Lovorn, 457 U.S. at 263 (emphasis added), and to substitute, in its stead, Adams's more flexible requirement of evenhanded application in the "vast majority of cases," see Dugger v. Adams, 489 U.S. at 411 n.6.

Notably absent from amicus curiae's argument is any suggestion that disposition of this case in any way depends on the distinction between "all" and "most," and for good reason. As was demonstrated by Morales below, the California Supreme Court's treatment of questions of timeliness is uneven by any definition. Morales never contended below that the mere existence of good cause exceptions rendered the guidelines inadequate, and he specifically acknowledged Adams's holding

regarding the permissibility of occasional exceptions to the rule.

The simple fact is that in the vast majority of cases similar to Morales's, the California Supreme Court found petitions timely filed. Amicus curiae's observations regarding the alleged conflict between Hathorn and Adams are wholly irrelevant.

The remainder of the second section of the brief amicus curiae consists of various musings on different reasons a court may choose not to overlook a potential procedural bar. The issue amicus curiae seeks to raise thereby is extremely unclear, but its intent apparently is to take Morales to task for failing to compare his case to all procedurally similar cases in which relief was granted.[2] According to amicus curiae, "common sense" requires us to ignore cases in which a potential default was forgiven (either implicitly or explicitly) in order to reach, but nevertheless reject, the merits of the claims. Thus, contends

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[2] A frequent amicus curiae in California cases, the Criminal Justice Legal Foundation presumably is aware of the impossibility of this task. The California Supreme Court never has granted a post-affirmance habeas corpus petition in a capital case since the death penalty was reinstated in California in 1977. In contrast, it has denied over 160 such petitions, many explicitly on the merits, despite delays vastly exceeding that in the instant case.

amicus curiae, this case presents an issue whether the "plain statement" rule of Harris v. Reed, 489 U.S. 255 (1989), and Michigan v. Long, 463 U.S. 1032 (1983), governs the determination whether a state procedural bar has been regularly and evenhandedly applied, rather than simply the determination whether it was applied in the case sub judice.

Amicus curiae is wrong; there is no such issue in this case. Morales did not rely on Harris v. Reed, 489 U.S. 255 (1989) or any other presumption in connection with his showing regarding the uneven application of the state-court's timeliness policies.[3] His showing was based on a detailed empirical review of the actual practice of the California Supreme Court, a review which in no way validates amicus curiae's "common sense" view that the California Supreme Court simply chooses not to consider a difficult procedural issue when a claim clearly is without merit. It is clear from even a cursory review of the California Supreme Court's habeas corpus procedures that the state court takes the federal court consequences of its actions very seriously, particularly with respect to the adequate and

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[3] Reliance on Harris v. Reed, 489 U.S. 255 (1989) would have been particularly inappropriate since many of the orders involved herein are largely unexplained denials. See Ylst v. Nunnemaker, 501 U.S. 797 (1991).

independent state ground doctrine. Thus, the court frequently includes language in its "post-card" denials signally its intent to have a procedural basis for decision treated as an adequate and independent state ground within the meaning of Harris v. Reed.[4] Moreover, the number of cases in which the California Supreme Court has issued orders explaining that it considered various claims both denied on the merits and procedurally defaulted in one way or another is voluminous.[5]

At no time during the litigation of this case below did

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[4] See, e.g., the following cases, all citing Harris v. Reed, 489 U.S. 255 (1989): In re Clair, S045241; In re Pinholster, S034501; In re Davis, S045183; In re Hawkins, S039950; In re Frierson, S044946; In re Morris, S050354; In re Turner, S037488; In re Anderson, S047514; In re Bonin, S051633; In re Montiel, S033108; In re Mayfield, S050116; In re Stankewitz, S047669; In re Alcala, S047409; In re DeSantis, S051609; In re Boyde, S039855; In re Rodrigues, S043207; In re Williams, S053130; In re Webster, S053140.

[5] See, e.g., In re Allen, S031165; In re Hunter, S031076; In re Williams, S039285; In re Coleman, S025597; In re Murtishaw, S026455; In re Hernandez, S029520; In re Kimble, S025105; In re Hovey, S008414; In re Wade, S015158; In re Frank, S013949; In re Hamilton, S024477; In re Miranda, S028518; In re Bloom, S035229; In re Bacigalupo, S03738; In re Deere, S036482; In re Grant, S038643; In re Bean, S04082; In re Hayes, S03945; In re Adcox, S017293; In re Allison, S016415; In re Walker, S017679; In re Siripongs, S018140; In re Clair, S045241; In re Cain, S032447; In re Pinholster, S034501; In re Davis, S045183; In re Cummings, S044871; In re Fauber, S030753; In re Hawkins, S039950; In re Wharton, S042418; In re Morris, S050354; In re Turner, S037486; In re Turner, S034988; In re Edwards, S030742; In re Belmontes, S012093; In re Howard, S042592; In re Stanley, Crim. 25155.

the state contend that potential procedural defaults had not actually been waived in these cases upon which Morales relied. Amicus curiae should not be heard to so contend now.

III

DRACONIAN STATE PROCEDURAL RULES ARE NOT REQUIRED TO ENSURE THEIR CONSISTENT APPLICATION BY THE STATE COURTS

The final section of the brief of amicus curiae picks up the tired refrain that the only way California can escape its present "predicament" is for it to adopt draconian rules "that all claims with no exceptions must be filed by a fixed date." Brief of Amicus Curiae at 11. It is a particularly myopic view that admits of no alternatives in the wide expanse between "no rule" and "no exceptions."

Amicus curiae's in terrorem characterizations notwithstanding, there is nothing in either the Ninth Circuit's opinion or in the numerous district court decisions predating it that requires injustice in the service of adequacy and independence. State rules allowing for equitable exceptions satisfy the adequate and independent state ground doctrine

whenever "the state is scrupulous about treating particular reasons as 'sufficient' routinely and others as insufficient with equal regularity." Prihoda v. McCaughtry, 910 F.2d 1379 (7th Cir. 1990).

CONCLUSION

For the foregoing reasons, respondent Michael A. Morales respectfully submits that the motion of the Criminal Justice Legal Foundation for leave to appear amicus curiae be denied, or in the alternative, that its arguments should be rejected with a denial of the petition for writ of certiorari.

DATED: November 4, 1996

David A. Senior*
CONDON & FORSYTH
1900 Avenue of the Stars
Suite 650
Los Angeles, California 90067
Telephone: (310) 557-2030
Attorneys for Respondent
Michael A. Morales

* Counsel of Record

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within entitled action; my business address is: 1900 Avenue of the Stars, Suite 650, Los Angeles, California 90067-4486.

On the date indicated below, I served the foregoing document described as RESPONDENT'S OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND SUPPLEMENTAL BRIEF IN OPPOSITION on the interested parties in this action, by placing [ ] the original [X] a true copy thereof enclosed in sealed envelope(s), addressed as follows:

Daniel E. Lungren, Attorney General
Keith H. Borjon, Supervising Deputy Attorney General
300 South Spring Street
Los Angeles, California 90013

[X] (By Mail) I am "readily familiar" with this firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage hereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on November 4, 1996 at Los Angeles, California.

[ ] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Jennifer V. Ball

CONDON & FORSYTH
1900 AVENUE OF THE STARS
LOS ANGELES, CALIFORNIA 90067

1251 AVENUE OF THE AMERICAS
NEW YORK, N.Y. 10020
(212) 757-6870
TELEX: 426978
FACSIMILE: (212) 315-1134

TELEPHONE: (310) 557-2030
FACSIMILE: (310) 557-1299

1100 FIFTEENTH ST., N.W.
WASHINGTON, D.C. 20005
(202) 289-0500
FACSIMILE: (202) 289-4524

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Calderon v. Morales
U.S.S.C. No. 96-355
C & F File No. 60430

Dear Sirs:

Please find enclosed an original and 10 copies of Respondent's Opposition to Motion for Leave to File Brief Amicus Curiae; Supplemental Brief in Opposition in the above-referenced matter. Please note that on October 10, 1996, Respondent's Motion for Leave to Proceed in Forma Pauperis was filed with the Court.

We also enclose an additional copy of Respondent's Opposition together with a self-addressed, stamped envelope. We would be grateful if you would conform and return the copy to us in the enclosed envelope.

Should you have any questions regarding this matter, please do not hesitate to contact us.

Thank you for your assistance.

Sincerely,

Jennifer V. Ball
Legal Assistant

Enclosures